(25,285)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 477.

THE ARIZONA COPPER COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

JOSEPH B. HAMMER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1916.

1 *Names and Addresses of Attorneys of Record.*

L. Kearney, Clifton, Arizona; F. E. Curley, Tucson, Arizona, Attorneys for plaintiff.

W. C. McFarland, H. A. Elliott, Clifton, Arizona, Attorneys for Defendant.

2 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Amended Complaint.

Plaintiff above-named in this, his amended complaint, complains of defendants and alleges:

1.

That plaintiff is a resident of the County of Greenlee, in the State of Arizona, and at times hereinafter mentioned was, and now is a citizen of the said State of Arizona.

2.

That defendant, The Arizona Copper Company, Limited, at all times hereinafter mentioned, was and now is a corporation, duly incorporated under the Acts of Parliament of the United Kingdom of Great Britain and Ireland known as the Company's Acts, 1862 to 1883, having its registered office at Edinburg, Scotland, and at all such times was and now is a corporation and subject of Great Britain, and that it has filed its appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phœnix, Arizona, and also filed its appointment of its statutory agent in the office of the county recorder of the County of Greenlee, State of Arizona, and that it has published its articles of incorporation and filed the same in the office of said Arizona Corporation Commission, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in said State of Arizona, and that during the times and places herein mentioned it
3 was, has been, and yet is, such foreign corporation, lawfully doing business at said Greenlee county, and engaged in carrying on the business of mining, smelting, conducting machine shops, concentrator works, electric plants, railroading, treating and reducing ores, conducting stores, and engaged in divers other business pursuits at Greenlee County, State of Arizona, in its corporate name of "The Arizona Copper Company, Limited."

3.

That during the times herein mentioned, at a point of about two miles from the town of Clifton, Greenlee County, State of Arizona, the defendant has owned, maintained, conducted, and yet owns, maintains and conducts, extensive smelting and reduction works, where it manufactures from 70 to 90 tons of copper each day, and that in said smelter it grinds up and heats a large amount of flux and ore into calcine; that said ores are ground and heated at its roasters at said smelter from where it is taken to the feed floor of said smelter, and emptied into hoppers which carry it into the furnaces.

That said feed floor is elevated about eighteen feet above the ground, and is about four hundred feet long and about twenty-four feet wide, and lengthwise of this feed floor two standard gage railroad tracks traverse the same to roasters, a distance of about 1,000 feet, where calcine is loaded into large iron cars, propelled by electricity from said roasters to said feed floor, on said standard gage tracks.

That said cars weigh about 23,000 pounds, and hold about 30,000 pounds of hot calcine; that when said cars containing calcine are brought to said feed floor, the calcine is emptied from said cars into hoppers, which traverse said feed floor at right angles, and from said hoppers said calcine is emptied into furnaces.

4 That said cars have brakes and are arranged with slide gates, valves, or openings at the bottom thereof, which said openings are closed and opened with a lever, by the motorman in charge of said car, and when the lever is pulled which opens the said valves, the calcine runs out of said cars into said hoppers, which said hoppers are situated just underneath said feed floor, and connect with the furnaces of said smelter.

*(That if said levers are not kept in proper place, said valves will open, and calcine will be emptied from said cars wherever the same may be situated, and defective brakes permitted said car to wander where plaintiff was working, as herein alleged.)

That on said feed floors there are about six cross tracks, of about sixteen inches wide, which cross said standard gage tracks at right angles.

That at the time of the injury herein complained of, some five or six hoppers, at right angles, crossed said feed floor just underneath thereof; said hoppers being about twenty-eight inches wide and thirty inches deep, and the same opening at the surface on said feed floor to receive said calcine.

That at the time of the injury herein complained of, the plaintiff was a boiler maker and skilled workman, and as such was an employee of defendant for hire, and within the scope of his employment, as servant of defendant, was making alterations about said feed floor by putting in angle irons around a hopper to make it dust proof, and performing work on what is called the fettling system.

That prior to and on December 28th, 1914, and at the time plaintiff received the injuries herein complained of, he was employed by

and in the employment of defendant, and that on said day while engaged in his work for defendant repairing and making improvements on said hoppers, and while acting within the scope of his duties as boiler maker and skilled iron worker, and while
5 acting under the said contract of employment as such employee of defendant, he received injuries in defendant's said smelter, and which said smelter then and there being operated and its machinery and equipment at all times herein mentioned are and were propelled by steam and electric power;

That said injuries were occasioned by the condition and conditions of plaintiff's said employment while working in hazardous employment in defendant's said smelter; that the circumstances and conditions of said injuries are as follows:

That on December 28th, 1914, while plaintiff was at work in one of said hoppers, as said skilled workman and employee of defendant, engaged in putting in an angle iron to make said hopper dust proof, and holding said iron below while plaintiff's helper was marking off holes from above for the purpose of securing said angle iron in place, and was performing said work just under one of said standard gage railroad tracks on said feed floor in said smelter, *when* large quantities of said hot calcine then being carried in one of defendant's cars, as aforesaid, escaped therefrom and fell into said hopper then occupied by plaintiff and over and upon plaintiff, and that said hot calcine greatly burned the plaintiff on his head and about his neck, and left arm from shoulder down was greatly burned, and the right arm from shoulder down was burned, and right hip and left leg all the way from groin to top of the foot were burned, and a burn on right hip, and that said sulphur fumes sickened and stifled plaintiff; that as a direct result of said burns the left hand and arm of plaintiff *is* is weakened and crippled, and left hand rendered useless, which has, and will continue to disable the plaintiff from following his
6 vocation as boiler maker, steel foundry business, and skilled workman, and that his fingers and thumb on his left hand are drawn out of shape and are useless in the performance of manual labor requiring the use of the same, and that his stomach, *(bowels, intestines, shoulder and general physical condition were thereby greatly and permanently injured and affected and he was otherwise greatly burned and injured) and that his right hip is greatly injured, and his left leg is injured, and that on account of said injuries, the plaintiff has been and is greatly disfigured, scarred, crippled and permanently injured, *(and plaintiff's ability to earn a living has been greatly and permanently reduced).

That on account of said injuries the plaintiff has been compelled to undergo a hospital treatment where he was confined to his bed for nine weeks, and during which time he suffered great mental and physical pain, and had opiates injected into him to relieve his suffering, and yet suffers pain, and will continue to suffer pain.

5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant; that

said injuries were the result of an accident due to a condition of such occupation and of a place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said condition or conditions of the employment of the plaintiff in said smelter and of the place of the performance of said work.

6.

That the plaintiff at the time of his injuries was fifty years of age; that his usual wages were from $150.00 to $200.00 per month, and that he was capable of earning such wages and for work
7 within the line of his said employment, as such skilled worker, he received such wages; that he was strong, healthy, able-bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the time of his said injuries was 20.91 years; that since said injury plaintiff has been unable to perform any kind of labor and has lost in wages $450.00, and will be unable to perform any labor.

That in view of said premises the plaintiff has been and is damaged in the sum of fifty thousand ($50,000) dollars, and for which the defendant is liable.

Wherefore, plaintiff demands judgment against defendant for the sum of fifty thousand ($50,000) dollars; together with costs of this action.

L. KEARNEY,
Attorney for Plaintiff.

---

*(NOTE.—Denotes amendments made to original Amended Complaint.)

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. Joseph B. Hammer, vs. The Arizona Copper Company, Limited, a corporation. Amended Complaint. Filed Nov. 3rd, A. D., 1915, at 9 A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

8 UNITED STATES OF AMERICA:

District Court of the United States, District of Arizona.

No. 137 (Phœnix).

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Action Brought in said District Court and the Complaint Filed in the Office of the Clerk of said District Court in the City of Phœnix and County of Maricopa.

The President of the United States of America to the Arizona Copper Company, Limited, a corporation; James G. Cooper, Statutory Agent, Clifton, Arizona, Defendant, Greeting:

You are hereby directed to appear, and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within 20 days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Witness: the Honorable William H. Sawtelle, Judge of said District Court, this 30th day of March in the year of our Lord one thousand nine hundred and fifteen and of our Independence the one hundred and thirty-ninth.

[SEAL OF COURT.]

GEORGE W. LEWIS, *Clerk*,
By R. E. L. WEBB,
Deputy Clerk.

9 UNITED STATES MARSHAL'S OFFICE,
District of Arizona:

I hereby certify that I received the within writ on the 31 day of March, 1915, and personally served the same on the first day of April, 1915, upon Jas. G. Cooper, personally, by delivering to, and leaving with him a true copy hereof to which was attached a copy of the Bill of Complaint, filed herein. The said Jas. G. Cooper at the time of service being the Statutory Agent of Defendant Corporation, the Arizona Copper Company, Limited. Service was made at Clifton, Greenlee Co., Arizona.

J. P. DILLON,
U. S. Marshal,
By I. N. DILLINER, *Deputy*.

April 2, 1915.

Iarshal's Docket No. 472. No. 137 Phœnix. No. District Court, District of Arizona. Joseph B. , vs. The Arizona Copper Company, Limited, a lant. Summons. L. Kearney, Clifton, Arizona, , Phœnix, Arizona, Plaintiff's Attorneys. Filed leorge W. Lewis, Clerk. By R. E. L. Webb,

ict Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
COPPER COMPANY, LIMITED, a Corporation, Defendant.

First Amended Answer.

Arizona Copper Company, Limited, a corporation, e named by its attorneys with this its answer to it on file herein and demurs thereto and for r alleges and shows the court as follows:

I.

appear in and by the allegations of plaintiff's ntiff at the time and place of his alleged injury or d in a labor, service, employment or occupation ner mentioned and provided for in Chapter 6 of ised Statutes of the State of Arizona, 1913.

II.

ppear in and by the allegations of said complaint ed injury or injuries were caused by or resulted r accidents to this plaintiff in the course of work or occupation, as in said complaint alleged and t of and in the course of plaintiff's labor, service id due to a condition or conditions or plaintiff's employment.

III.

pears in and by the allegations of said complaint laintiff has any cause of action against this de- son of the negligence of this defendant, its serv- ther agents, and not by reason of an accident or ntiff in the course of work in his employment or id complaint alleged, arising out of and in the service and employment and due to a condition aid occupation or employment.

IV.

That if it be held by this court that plaintiff's complaint contains allegations sufficient to constitute a cause of action under the provisions or any thereof of said Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913, this plaintiff has nevertheless attempted to set forth in his said complaint a cause of action, the sufficiency of which is not admitted but expressly denied, under the common law or the law otherwise than as provided by said Chapter 6 of said Title 14 in this particular, namely: Alleged injury or injuries to this plaintiff by reason of the negligence of this defendant, its servants, employees or other agents, by reason of which several causes of action are improperly united in plaintiff's complaint.

V.

That it does not appear in said complaint that plaintiff's alleged injury or injuries was not caused by his own negligence.

VI.

That it appears in said complaint that the alleged injury or injuries of this plaintiff, if any there were, were occasioned, wholly by, and resulted from the usual and ordinary risks of the employment in which the plaintiff was engaged at the time and place of the
12 said alleged injury or injuries as in said complaint described, and were wholly assumed by this plaintiff in entering upon and continuing in said employment, and that said risks were wholly known to and appreciated by said plaintiff in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this plaintiff, could have been fully known to and appreciated by him, in that it is not alleged in said complaint that the dangers of said employment at the time and place and in the manner mentioned and described in said complaint, were latent or hidden from or undiscovered to this plaintiff, and that by the exercise of due or any diligence or care for his personal safety, that he could not have discovered said conditions and have thereby avoided his said injury or injuries.

VII.

That it is not alleged in said complaint that the acts and things done or said by the officers, servants, employees or other agents of this defendant, at the time and place of plaintiff's alleged injury or injuries by this plaintiff in his complaint alleged to have caused the said injury or injuries, were done and said by such officers, servants, employees or other agents of this defendant, while acting within the course of the employment and within the scope thereof of said officers, servants, employees or other agents, while then and there in the employ of this defendant.

VIII.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant prays judgment as to the sufficiency of said complaint in the particulars hereinabove specified and that plaintiff take nothing thereby and that defendant go hence with its costs.

13

IX.

It appears upon the face of the said complaint that plaintiff seeks to recover judgment against the defendant under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of Section 7 of Article 18 of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this defendant causing or contributing to plaintiff's alleged injury, and that said Employers' Liability Law, and said Section 7 of Article 18 of the Constitution of Arizona are in contravention and violation of the Constitution of the United States, particularly the 14th Amendment thereto, in that they seek to deprive this defendant of its property without due process of law, and deny it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this defendant, causing such injuries or contributing thereto, and for the reasons in this paragraph above set forth said complaint does not state facts sufficient to constitute a cause of action against this defendant.

X.

It appears on the face of said complaint, and the records so show in this cause, that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter 6 of Title 14 of the Civil Code, the Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article 18 thereof, in that said Employers' Liability Law attempts to give the plaintiff the right to recover damages from defendant in this action, notwithstanding the injuries for which said damages were claimed were contributed to or in part caused by plaintiff's own negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing said injuries were contributed to and in part
14 caused by plaintiff's own negligence, and that for the reasons in this demurrer set forth, said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant.

Without waiving any of the foregoing demurrers, but if the same shall be overruled or denied, this defendant further answering said complaint admits, denies and alleges as follows:

1.

Admits the allegations of Paragraph 1 of plaintiff's complaint.

2.

Admits the allegations of Paragraph 2 of plaintiff's complaint.

3.

Admits the allegations of Paragraph 3 of plaintiff's complaint, save and except that this defendant denies that this plaintiff at the time of his said injury or injuries as claimed and alleged in said complaint, was acting within the scope of his employment as servant of this defendant, while making alterations above the feed-floor by putting in angle-irons around a hopper to make it dust proof on what is called the fettling system, as mentioned and described in said complaint.

4.

Admits that prior to and on December 28, 1914, and at the time this plaintiff received the injury or injuries mentioned and complained of in said complaint, plaintiff was employed by and in the employment of this defendant. Denies that this plaintiff received injury or injuries in defendant's smelter as mentioned and described in said complaint on last said date while this plaintiff was engaged in his work for this defendant and while acting within the scope of his duties as boiler maker and skilled iron workman, as in said complaint described, and in this connection this defendant alleges that this plaintiff did on the said date of his said claimed injury or injuries, carelessly, negligently, wantonly and wrongfully depart from, refuse to obey, comply with or in any way or manner to follow the express orders, directions, requests and instructions of this defendant, its authorized officers, servants, employees and other agents, by reason whereof the injury or injuries of plaintiff, if any he have received, were directly, approximately and wholly caused.

Admits that prior to and on December 28, 1914, defendant's smelter had been and was operated, and its machinery and equipment at all times had been and were propelled by steam and electrical power as mentioned and described in said complaint.

Denies that plaintiff's injury or injuries as set forth and claimed in said complaint or otherwise, were occasioned by the condition *and* conditions or conditions of plaintiff's employment, while working in a hazardous employment in defendant's smelter, as described in said complaint or otherwise.

Admits that on December 28, 1914, this plaintiff was at work in a hopper, as described in said complaint, and as a skilled workman and employee of defendant engaged in putting in an angle-iron to make said hopper dust proof, and was holding said iron from below while plaintiff's helper was marking holes from above for the purpose of securing said angle iron in place, and was performing said work just under one of said standard *guage* railroad tracks on the feed-floor,

as in said complaint described, *(but denies that this de-
16 fendant, its officers, agents, servants or other employees did at such time and place carelessly and negligently cause one of its cars propelled by electricity and loaded with hot calcine, without notice or warning to this plaintiff and at such time and place carelessly and negligently brought said car to, over and above where plaintiff was performing said work in said hopper. Denies that this defendant at said time and place carelessly and negligently caused the valves of said car at the bottom thereof to become open, so that large quantities of hot calcine and sulphur fumes were negligently and carelessly poured upon the plaintiff while he was in said hopper and unable to escape therefrom as in said complaint alleged, or at all.) Admits that plaintiff received certain burns from said hot calcine, mentioned and described in said complaint, *(but denies that said burns, injury or injuries and the effects and results thereof, as described in said complaint or otherwise, were occasioned directly, indirectly, approximately or at all by the negligence of this defendant, its officers, servants, employees or other agents,) but denies that the injury or injuries of this plaintiff, if any he have received, as described in said complaint or at all, were occasioned by the condition or conditions of plaintiff's employment or occupation and arose out of and in the course of plaintiff's labor, service and employment with this defendant, and in this connection this defendant alleges and asserts.

That defendant furnished and provided this plaintiff with a helper,
able-bodied and fit to perform his work as such helper; that it
17 was one of the duties of said helper to watch for and observe the approach of the cars propelled by electricity and loaded with hot calcine as mentioned and described in plaintiff's complaint and to warn this plaintiff of the approach of such cars and to signal and stop the person or persons in charge of and operating said cars to give this plaintiff an opportunity to take and assume a place of safety for the purpose of allowing said cars to approach and pass on without injury or harm to this plaintiff; that at the time of plaintiff's alleged injury or injuries as claimed in said complaint, said helper carefully, cautiously and persistently performing the duties of his employment in that respect, noticed and observed the approach of said car; that said car was completely stopped at a considerable distance from the point at which this plaintiff was then engaged in his said labor and that thereupon said helper did notify and warn this plaintiff of the approach of said car; that said car had stopped and was waiting for him; the said plaintiff to assume a place of safety; that this plaintiff thereupon and after receiving said warning by said helper, carelessly, negligently, deliberately and without the exercise of due or any care or caution for the protection of his personal safety, refused to remove himself or to move at all, and did thereupon and after receiving said warning order and direct said helper to signal the person or persons in charge of said car or cars to proceed and to run by and over the place where this plaintiff was then working as described in said complaint.

Denies that as a direct result of burns to plaintiff's left hand and

arm as in plaintiff's complaint described, this plaintiff is weakened and crippled and his left hand rendered useless; denies that
18 said alleged condition of this plaintiff as described in said complaint, has and will continue to disable this plaintiff from following his vocation as boiler maker, steel foundry business and skilled workman, Denies that plaintiff's fingers and thumb on his left hand are drawn out of shape and are useless in performance of manual labor requiring the use of the same, and that his right hip is greatly injured and his left leg is injured, and that on account of said injuries the plaintiff has been and is greatly disfigured, scarred, crippled and permanently injured; and in this connection defendant alleges.

That the injury or injuries sustained by this plaintiff at the time and place mentioned and described in said complaint were and have been successfully and scientifically treated under the care and direction of competent surgeons and physicians and that said injury or injuries have been completely and successfully cured, save and except a slight contraction of the third and fourth fingers of the left hand, producing what is commonly known as a claw-hand. That the said state of said left hand and its condition of being a claw-hand are not permanent, incurable or such as to permanently disable or incapacitate this plaintiff from following his vocation as a boiler maker, steel foundry business and skilled workman, as in said complaint alleged or other gainful employment of like nature in which this plaintiff is skilled. That said state of said left hand and condition of being a claw-hand could have been, may now be or at any reasonable time in the future may be successfully treated and operated upon and such state and condition wholly and entirely removed by surgical operation which would cause no serious suffering or risk and would restore the original capacity for work and usefulness of said left hand; that such operation is advisable and that this plaintiff has been advised by competent physicians and surgeons that
19 such operation was desirable and necessary and would restore the original capacity for work in said left hand and its original usefulness and would cause no serious suffering or risk; that this defendant has offered and does now offer to pay all expenses necessary and attendance upon such operation but that this plaintiff has at all times and does now unreasonably refuse to submit himself to such operation.

5.

Admits that at the time of plaintiff's said injury or injuries plaintiff was engaged in manual and mechanical labor in the employment of this defendant as in said complaint alleged; denies that said injury or injuries were a result of an accident due to a condition of the occupation and of a place where the plaintiff was at work as in said complaint described or at all; denies that said injuries were not caused by the negligence of this plaintiff; denies that said injury or injuries as in said complaint described or otherwise, were the natural and proximate result of the condition or conditions of the employment in defendant's smelter of this plaintiff

in and of the place of the performance of said work as in said complaint alleged or otherwise.

6.

Defendant denies generally and specifically each and every, all and singular the allegations in said complaint contained, not herein specifically admitted or qualified.

Further answering said complaint, defendant alleges and shows the court:

I.

*(That defendant was not guilty of any negligence or any improper conduct toward this plaintiff, as in said complaint
20 alleged, or in any other way or manner, or at all, but,) That the injury or injuries received by this plaintiff, as alleged in said complaint or otherwise, if any there were, were received wholly and entirely by reason of plaintiff's want of proper care and caution, and due or any regard for himself in looking out for his own safety, and by reason of his carelessness and negligence in this, to-wit:

1. That this plaintiff was on said 28th day of December, 1914, and for sometime prior thereto had been in the employ of this defendant, at its new smelter near the Town of Clifton, County of Greenlee, State of Arizona, as a workman in what is commonly known as Repair Gang. That it was the duty of such Repair Gang and of plaintiff to make repairs and alterations, do and perform all work of such kind and nature in and about said smelter as should from time to time be authorized and directed by defendant.

2. That the defendant provided persons of the highest skill and competency or foremen to oversee and direct said work of said repair gang, and to properly instruct the members of said repair gang, and said plaintiff when and where and the manner in which to do such work. That it was the duty of the members of such repair gang, and of this plaintiff, to execute the directions of said foreman, and strictly to conform to directions of said foreman as to ways and means of performing such work, and carefully and prudently to obey and observe all instructions and warnings of such foreman for the personal safety of said repair gang, and for the skillful and workman-like manner of performing such work.

3. That on or about said 28th day of December, 1914, defendant acting by and through said foreman, instructed plaintiff to make certain alterations and repairs on what is known as the fettling floor in said smelter, and to place in and about certain hop-
21 pers, situate immediately under said fettling floor, angle-irons for the purpose of making said hoppers dust proof, as alleged in plaintiff's complaint. That the foreman of said repair gang conducted plaintiff to the place and places of said work and instructed plaintiff in the manner in which said work should be done, and in particular instructed, directed and ordered this plaintiff to do said work from the top of said fettling floor, and not to

go down into said hoppers, below said fettling floor, and below said broad gu*a*ge tracks, upon which this defendants from time to time operated what is known as a Calcine Car, described in plaintiff's complaint. That said instructions were given this plaintiff for the purpose of best securing his personal safety.

4. That being so warned and instructed, this plaintiff deliberately, carelessly and negligently, against said expressed warnings and instructions, and without the knowledge and consent of this defendant, did in the performance of work, refuse to remain upon the top of said fettling floor, but did go down into said hoppers below said fettling floor, and below and between said broad gauge tracks, upon which said Calcine Car was operated, as fully described in detail in plaintiff's complaint.

5. That it was wholly unnecessary in the performance of such work for plaintiff to enter said hopper and to go below said fettling floor and below and between said broad gauge tracks. That the skilful and workman-like manner in which to perform such work, was from the top of said fettling floor, as plaintiff had been fully warned and instructed, as aforesaid. That it was gross negligence for plaintiff to disregard said warnings and instructions and to go down into said hoppers and below said fettling floor and below and between said tracks upon which was operated said cal-
22 cine car. That this plaintiff had worked for many years in and about smelters and smelter plants and for a long time had worked in defendant's new smelter, and well knew that said calcine car was frequently from time to time operated along said broad gauge tracks, and so informed, plaintiff well knew the danger in going down into said hopper, below said fettling floor and below and between said tracks.

6. That defendant furnished and provided this plaintiff with a helper, able-bodied and fit to perform his work as such helper; that it was one of the duties of said helper to watch for and observe the approach of the cars propelled by electricity and loaded with hot calcine as mentioned and described in plaintiff's complaint and to warn this plaintiff of the approach of such cars and to signal and stop the person or persons in charge of and operating said cars to give this plaintiff an opportunity to take and assume a place of safety for the purpose of allowing said cars to approach and pass on without injury or harm to this plaintiff; that at the time of plaintiff's alleged injury or injuries as claimed in said complaint, said helper carefully, cautiously and persistently performing the duties of his employment in that respect, notified and observed the approach of said car; that said car was completely stopped at a considerable distance from the point at which this plaintiff was then engaged in his said labor and that thereupon said helper did notify and warn this plaintiff of the approach of said car; that said car had stopped and was waiting for him, the said plaintiff to assume a place of safety; that this plaintiff thereupon and after receiving said warning by said helper, carelessly, negligently, deliberately and without the exercise of due or any care or caution for the protection

of his personal safety, refused to remove himself or to move
23 at all, and did thereupon and after receiving said warning order and direct said helper to signal the persons or persons in charge of said car or cars to proceed and to run by and over the place where this plaintiff was then working as described in said complaint.

7. That plaintiff for some days before said 28th day of December, 1914, had been engaged upon like work on said fettling floor, and had placed said angle-irons in and about many other like hoppers, below said fettling floor and between said broad gauge tracks. *(Defendant is now informed and believes and upon such information and belief asserts the fact to be, that this plaintiff while so engaged upon said other and similar work, was from time to time interrupted by the operation of said calcine car; that at each of said interruptions said calcine car was stopped before running by and over the place where plaintiff was so engaged; that plaintiff was on each of said occasions warned of the approach of said car, and upon each of said occasions, well knowing the danger attendance upon remaining below said fettling floor and below and between said broad gauge tracks, while said car was operated over and above plaintiff, promptly accepted said warning and withdrew from said place of danger to a place of safety.)

II.

Further answering said complaint, defendant alleges that by reason of the matters and things hereinabove set forth, the claimed injury or injuries of plaintiff, if any there were, either as alleged in said complaint or otherwise, were occasioned wholly by, and resulted from the usual and ordinary risks, and from the unusual and extraordinary risks, deliberately, voluntarily, negligently and carelessly assumed by plaintiff, of the employment in which plaintiff was engaged at said time and place of his said injury
24 or injuries, which said risks were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were wholly known to and appreciated by plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on the part of plaintiff should have been fully known to and appreciated by him, and that said injury or injuries did not in any respect or at all, result from, or were in any degree occasioned by any neglect or default on the part of this defendant, either as alleged in said complaint or otherwise.

III.

Further answering, defendant further asserts that plaintiff's said injury or injuries did not in any respect or at all result from, or were in any degree occasioned by any neglect or default on the part of the defendant, its officers, servants, employees or other agents, either as alleged in said complaint or otherwise; that if it be held that plaintiff may maintain this action or may recover anything herein,

against this defendant, entirely without fault, this defendant would thereby be deprived of its property without due process of law, and would thereby be denied the equal protection of the laws of the State of Arizona, all of which is contrary to the Constitution of the State of Arizona, and to the Fourteenth Amendment of the Constitution of the United States of America.

Wherefore, defendant having fully answered, prays that plaintiff take nothing by his action, and plaintiff be hence dismissed with its costs herein expended.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant.

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. Joseph B. Hammer, vs. The Arizona Copper Company, Limited, a corporation. First Amended Answer. Filed Nov. 2, A. D., 1915, at 10:30 A. M. George W. Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

24½ *(NOTE.—Denoted amendments made to original First Amended Answer.)

25 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Motion to Strike.

Comes now The Arizona Copper Company, Limited, the defendant in the above entitled cause and moves the Court for an order to strike all that portion of plaintiff's amended complaint.

First. Beginning with the words, "that if said levers are not kept in the proper place" on line 7 page 3 and ending with the words, "as herein alleged" on line 10, same page.

Second. Beginning with the words, "and which had insufficient brakes" on line 16 page 4 and ending with the words, "unable to escape therefrom" on line 23 same page.

Third. Also beginning with the words, "that on account of" on line 5 page 5 and ending with the words, "was performing said work" line 8, same page.

on the ground that said portions of said amended complaint are irrelevant and redundant and constitute no part of a cause of action based upon Chapter 6, Title 14, of the Revised Statutes of Arizona, 1913.

W. C. McFARLAND.
H. A. ELLIOTT,
Counsel for Defendant.

Endorsements: No. 39 Tucson. In the United States District Court for the District of Arizona. Joseph B. Hammer, Pl'ff, vs. The Arizona Copper Co., Def. Motion to Strike. Filed November 22, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy.

26 In the United States District Court in and for the District of Arizona.

Minute Entry Made on Wednesday, November 24th, 1916.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Comes now the defendant herein by W. C. McFarland, Esquire, and H. A. Elliott, Esquire, its attorneys, and moves the Court to strike from the amended complaint of the plaintiff herein certain particulars therein contained, and thereupon said motion is confessed on all three grounds of the motion to strike by the plaintiff, appearing by his counsel, L. Kearney, Esquire, and Frank E. Curley, Esquire, and by leave of the Court plaintiff is given leave to amend his amended complaint on page 4, line 15 by striking out after the word "When", all that portion down to and including the words "escape therefrom" on line 23, and inserting in lieu thereof the words "large quantities of said hot calcine then being carried in one of defendant's cars, as aforesaid, escaped and fell into said hopper occupied by plaintiff and over and upon plaintiff."

27 In the United States District Court for the District of Arizona.

Minute Entry Made on Wednesday, November 24, 1915.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Comes now the defendant herein by counsel and demurs to the amended complaint of the plaintiff on the grounds set out in said demurrer heretofore filed as to the original complaint and contained in defendant's amended answer, and upon consideration by the Court it is ordered that said demurrer be and the same is hereby over-ruled, to which ruling of the court, defendant excepts.

28 In the United States District Court in and for the District of Arizona.

Minute Entries Made During Trial, Tuesday, November 23rd, 1915.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

This case came on regularly for trial on this day, the plaintiff appearing in person and with counsel, L. Kearney, Esquire, and Frank E. Curley, Esquire, and the defendant appearing by its counsel, W. C. McFarland, Esquire, and H. A. Elliott, Esquire, and both parties announce ready for trial. A jury of eighteen was called, sworn and examined as to their qualifications. Ozro A. Haskins was excused by the Court and Charles H. Dodge was called, sworn and examined in his place. The eighteen jurors now in the jury box were all found to be qualified and accepted by both sides. The hour for adjournment having arrived and the trial of this case not having been completed, the Court duly admonished the jury and excused them from further attendance upon this court until Wednesday, the 24th day of November, 1915, to which time the further trial of this case is now ordered continued.

Wednesday, November 24th, 1915.

The trial of this case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the eighteen jurors empaneled on yesterday, plaintiff strikes three and defendant three, and the remaining twelve, to-wit: C.
29 F. Winters, James Agee, L. D. Johnson, O. Z. Kane, L. G. Moore, Percy Rider, J. C. Wheat, Albert Brockman, B. M. Pacho, Francis A. Odermatt, Charles H. Dodge and Henry Meyer, Jr., were called and sworn to well and truly try the issues joined herein. Plaintiff invokes the rule excluding all witnesses, except those giving expert testimony and the plaintiff, from the court room during the trial of this case and said motion is not resisted by the defendant, and plaintiff's witnesses, Mrs. Joseph B. Hammer and Elmer Bentley, and defendant's witnesses, Mauro Provencio, Estanislado Provencio, Gustavo Provencio, A. B. Jones and George Frazier were called, sworn and put under the rule. H. C. Nixon was sworn as court reporter in this case. L. Kearney, Esquire, reads plaintiff's amended complaint and makes opening statement. H. A. Elliott, Esquire, reads defendant's first amended answer and makes opening statement. Upon motion of defendant, defendant is given leave by the court to amend its first amended answer on page 5, line 32, paragraph 4, beginning with the words "But denies" by striking out the remainder of said paragraph down to and including the words

"or at all" on page 6, and by striking out on page 6, beginning with the word "But" at the end of line 15 of first amended answer, down to the words "and denies" on line 20 of said amended answer and by striking out on page 9, line 30, beginning with the word "That" down to and including the word "but" in line 1 on page 10. Plaintiff moves the Court to strike from defendant's first amended answer all of paragraph 7 on page 13 commencing with the word "defendant" on line 10 down to and including the words "place of safety" in line 23, which motion was sustained by the Court, to which ruling of the court, defendant excepts. Plaintiff demurs to paragraph 2 and 3 on page 13 and 14 of defendant's first amended answer and said demurrer is sustained by the court, to which ruling of
30 the Court, defendant excepts. The plaintiff then to maintain upon his part the issues herein called as witness Joseph B. Hammer, who was duly sworn, examined and cross-examined. Plaintiff asks leave of the Court to amend his amended complaint by inserting on page 5, line 2, after the word "same" the words "and his stomach", and same is granted by the Court, to which ruling of the Court, defendant excepts. Plaintiff's exhibits, A, B, C, D and E, were admitted and filed. Elmer Bentley was called as a witness examined and cross examined. It is stipulated by counsel that John Holtz, if present, would testify as set out in the written stipulation on file in this case. It is stipulated by counsel in open court that the average length of life of a man of fifty years of age is twenty years. Dr. Mead Clyne was called as a witness for plaintiff, sworn, and examined in part. The hour for adjournment having arrived and the trial of this case not having been completed the court duly admonished the jury and excused them from further attendance upon this case until Friday, the 26th day of November, A. D., 1915, to which time the further trial of this case is now ordered continued.

Friday, November 26th, 1915.

The trial of this case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: Dr. Mead Clyne was called to the stand for further examination in chief and was examined and cross examined. Dr. I. E. Huffman was called as a witness for the plaintiff, sworn, examined and cross examined. It is stipulated in open Court that Dr.
31 Huffman is a practicing physician and qualified to testify. Mrs. Joseph B. Hammer was called as a witness, examined and cross examined, and thereupon the plaintiff rested his case. The defendant then to maintain upon its part the issues herein recalled for further cross-examination Joseph B. Hammer and Elmer Bentley and called as witness Estaislado Provencio, George W. Frazier, Mauro Provencio, Gustavo Provencio and A. B. Jones, who were examined and cross examined, and introduced in evidence Defendants Exhibit No. 1 which was admitted and filed. Plaintiff's Exhibit F was admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed,

the Court duly admonished the jury and excused them from further attendance upon this case until Saturday, the 27th day of November, A. D., 1915, at 9:30 o'clock A. M., to which time the further trial of this case is now ordered continued.

Saturday, November 27, 1915.

This case having been continued from a previous session of this Court, comes now all the parties hereto, and comes also the jurors herein, their names are called and all answering thereto respectively, the further trial of this case proceeds as follows: Gustavo Provencio was recalled by the defendant for the purpose of correcting his testimony given on yesterday. A. B. Jones and Mauro Provencio were called by the defendant for further examination. Defendant reads statement that if Harry Neilson were present he would testify as set out in affidavit on file herein. Dr. J. I. Butler was called as witness by the defendant, sworn, examined and cross-examined, and thereupon the defendant rested its case. Plaintiff called in re-buttal, Elmer Bentley and Joseph B. Hammer, who were further examined and cross-examined, and thereupon the plaintiff rested his case. The defendant then moves the Court to direct a verdict in this case in favor of the defendant:

32

1st. Because the evidence submitted does not sustain a verdict or support a judgment in this cause.

2nd. Because all the evidence in the cause shows that if the plaintiff received any injury at the day and date alleged in his complaint that such injury was the result of his own negligence.

3rd. Because the evidence in the cause shows by an overwhelmingly preponderance that a verdict on the cause of action alleged in the complaint should be for the defendant.

which said motion is submitted to the Court and upon consideration thereof by the Court, said motion is denied, to which ruling of the Court, defendant excepts. There being no further testimony offered by either side and the evidence being closed, argument of respective counsel was had and the Court instructed the jury orally and said jury retired in charge of L. V. Russell, Bailiff, officer of this Court, first duly sworn for that purpose to consider their verdict. And subsequently said jury return into Court, their names are called and all answering thereto respectively upon being asked if they have agreed upon a verdict, report that they have agreed and thereupon present the following verdict:

"JOSEPH B. HAMMER, Plaintiff,
vs.
ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above entitled cause, upon our oaths do find for the plaintiff and assess his damages at $12,000.

O. Z. KANE, *Foreman.*"

ury is discharged from this case and it is ordered entered in accordance with said verdict.

No. 39, Tucson.

JOSEPH B. HAMMER, Plaintiff,
against
COMPANY, LIMITED, a Corporation, Defendant.

Verdict.

luly empaneled and sworn in the above entitled ths, do find for the plaintiff and assess his damages

O. Z. KANE, *Foreman.*

No. 39 Tucson. United States District Court, Dis- Joseph B. Hammer, Plaintiff, vs. Arizona Copper rporation, Defendant. Verdict. Filed Nov. 27, Lewis, Clerk, by Effie D. Botts, Deputy Clerk.

trict Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
COPPER COMPANY, LIMITED, a Corporation, Defendant.

Judgment.

e on regularly for trial the 23d day of Novem- ntiff being present and represented by his attor- Esq., and Frank Curley, Esq., and the defendant by its attorneys W. C. McFarland and H. A. twelve men were regularly impanelled and sworn Witnesses on the part of plaintiff and defendant xamined and documentary evidence on the part plaintiff was introduced. After hearing the evi- nt of counsel and the instruction of the court the sidering of their verdict and subsequently on the mber 1915, returned into court and being called names and say that they find the verdict for the st the defendant in the sum of twelve thousand

virtue of the law and by reason of the premises ered and decreed and adjudged, that the plaintiff r, do have and recover of and from said defend- Copper Company, Limited, a corporation, the sum

of twelve thousand ($12,000) dollars with interest thereon at the rate of six (6%) per cent per annum from date hereof until paid together with the plaintiff's costs and disbursements incurred in this action amounting to the sum of $166.45 with interest thereon at six (6%) per cent per annum from date hereof until paid,
35 and for which let execution issue.
Judgment rendered November 27th, 1915.

Endorsements: In the District Court of the United States for the District of Arizona. No. 39 Tucson. Joseph B. Hammer, plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. Judgment. Filed November 29, 1915. George W. Lewis, Clerk, by Effie D. Botts, Deputy.

36 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Proposed Bill of Exceptions.

Be it remembered that on the 23rd day of November, A. D., 1915, at a regular and stated term of the United States District Court for the District of Arizona, the same being one of the regular judicial days of the November term of said court, 1915, begun and holden in the City of Tucson, Arizona, before his Honor, William H. Sawtelle, District Judge, the issues joined by the pleadings in said cause came on to be tried by the said Judge and the jury empanelled and sworn to try the issues in said cause. The plaintiff was representer by L. Kearney and F. E. Curley, his attorneys, and the defendant by W. C. McFarland and H. A. Elliott, its attorneys.

To sustain the issues on the part of the plaintiff and on the part of the defendant, the following evidence was introduced.

37 In the District Court of the United States District of Arizona.

Case No. 39.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Before Honorable William H. Sawtelle, Judge.

TUCSON, ARIZONA, November 23rd, 1915.

TRANSCRIPT OF TESTIMONY.

Appearances:

For the Plaintiff L. Kearney, F. E. Curley.
For the Defendant W. C. McFarland, H. A. Elliott.

Be it remembered, that this cause came duly on for trial in the above-entitled court before the Judge presiding therein, and a jury duly empanelled and sworn to try the issues, on Tuesday, November 23rd, at 1:30 P. M. Whereupon the following proceedings were had and testimony adduced, to-wit:

38 *Index.*

Plaintiff's Witnesses.

Defendant's Witnesses.

Plaintiff's Rebuttal.

	Direct.	Cross.	Redirect.	Recross.
Elmer Bentley	160	166	..	..
Joseph B. Hammer	166	170	..	..

Charge to Jury: Pages 172-178.

39 WEDNESDAY, Nov. 24th, 1915: 9:30 a. m.

The Court: You may proceed.

(Counsel for plaintiff reads his complaint.)

The Court: Do you desire to make a statement or not?

Mr. Kearney: Why, just briefly, a few words. Let's see; the first and second allegations of this complaint are admitted?

Mr. McFarland: Oh, as to the organization, yes, we admit that.

Mr. Kearney: Now, gentlemen, we will show by the evidence that the Arizona Copper Company runs a smelter, which concern employs a good many men, and a part of this smelter was what is known as a feed-floor, which is elevated above eighteen feet above the ground; that it has tracks running from a certain point some distance away where they grind up rock, and this is taken from there, and then, I think there are two of those large electric cars which run down these tracks from that place and come down onto the feed-floor. The feed-floor is just above—for instance, we will say the furnaces are underneath here, right here, (indicating), and right along three under the floor are these hoppers about twenty-six inches wide and thirty inches deep. Now at the time that I indicated the cars start from are roasters, and this calcine is brought from these roasters in this car and is carried across this feed-floor. In this car there are valves, or slides, and these valves are controlled and pulled open, letting the calcine through an opening in the bottom of this car, and this calcine, which is red-hot—not only warm—red-hot, is dumped into these hoppers and shoved on into the furnaces. Now at the time the plaintiff was working there at that point, and it is admitted that he was employed at the time and was working there, that he was putting iron plates in this hopper to make it dust-proof, and these plates had to be riveted; that he was working in this hopper and in the performance of his work it was absolutely necessary for him to be in these hoppers, and make the measurements.

Mr. McFarland: If the Court please, I think that is improper to state.

Mr. Kearney: We state we are going to prove this.

Mr. McFarland: That is a question for the jury.

The Court: No, as I understand it, he is stating what he expects to prove.

Mr. McFarland: I did not understand it that way.

Mr. Kearney: We intend to offer testimony to that effect.

The Court: That is what you expect to prove?

40 Mr. Kearney: That is what we expect to prove. And while he was in there at work—of course, it is a narrow place in

there for a man, say, my size or the size of Mr. Hammer here. When he is in there he fills up all the space, and he cannot turn around in there very quickly. And this car comes on down from the roaster with this hot calcine in it, comes on down to this point where he was at work, and from some cause or other—I don't know what caused it—you will hear all about that—the bottom of this car filled with hot calcine suddenly opened dumping it upon him. The car came on up and when it got over about where Mr. Hammer was working this hot calcine was caused to pour out upon him. Mr. Hammer had nothing to do with the running of the car. There was another person in charge of the car, and his business there was fixing this hopper. There were other employees who had charge of the car that brought this hot calcine down, and let's see, I think there was probably a helper with him there, a Mexican boy that they had furnished. And we also claim that we will show if the valves had been properly taken care of, or slides in that car, that that calcine would not have poured out at that place on the plaintiff.

Mr. McFarland: If the Court please, I think that is improper for the reason that there is *not* allegation in the complaint that there was improper care or negligence of the defendant or its agents or servants in that respect. He says if it had been properly taken care of it would not have released the calcine. Now the question of care and negligence is the feature I object to. Counsel is telling the jury that he expects to prove this, and I object to it for the reason that there is no allegation in his complaint to that effect.

The Court: I think that objection is well taken. Counsel may state what he expects to prove, or the conditions as they were in existence, and then let the jury draw the conclusion whether or not the plaintiff himself was negligent. If the plaintiff wasn't negligent, why, then the other questions, of course, will be submitted to the jury.

Mr. Kearney: Mr. Hammer is a boiler-maker and an iron-worker, and he is called in there to fix this hopper and make it dust-proof. If there is any job there of iron work or bar work, he is called to another place to perform the work, and we will show and prove here that the dropping of the calcine into this hopper and burning the plaintiff, the plaintiff himself had no concern in that. It was an accident that he himself did not bring about. He didn't pour calcine upon himself, and when the calcine commenced pouring upon him the car which contained the calcine was right over him and there was no chance for him to get out. Then he screamed and tried to push the car ahead, run the car ahead, thinking perhaps that he could get out of there. He had to get out right where the car came over him there. And so the car finally passed over him and there were some fellows there when the car passed over him came and helped him out of there. And we expect the testimony to show that he hollered to push the car over, push the car over where he was working. At that time the calcine had already spilled upon him, and the only means of his getting out of there, or to prevent being roasted alive was to have that car pass over him so

that he could get out, pass out of that hole. And I think
41 the testimony will show that he is permanently injured. He was a boiler-maker and iron-worker, and having received a good many burns about his body, his left hand is practically ruined; and that he is a skilled workman. That is about as far as I wish to go in making a statement of what we expect to prove. I thank you, gentlemen.

Mr. Elliott: If the Court pleases, and gentlemen of the jury, I will now read the defendant's answer to the merits of plaintiff's complaint.

The Court: Just state from what page you are reading.

Mr. Elliott: On page 4 I believe, or five, as it appears there, immediately following the demurrers.

The Court: Commencing with the word "denies" down to the words,—to and including the words, "or at all", may be stricken out of the answer.

Mr. Curley: Beginning with "but denies" on the bottom of page 5.

The Court: No, commencing with the word "denies" on page 6.

Mr. Curley: No, but beginning on the bottom of page 5 with the words, "but denies that this defendant or its officers, agents or servants," etc., "propelled by electricity and loaded with hot calcine, without notice or warning," that whole thing should come out.

Mr. Elliott: All the denials of negligence and carelessness.

The Court: That was in response to the paragraph of the complaint——

Mr. Curley: Of the original complaint.

The Court: That was stricken out on your motion, as I understand it.

Mr. Elliott: Yes, sir.

The Court: That may go out also.

Mr. Elliott: All denials of negligence or carelessness?

The Court: Commencing with the words, "but denies" on the last line of page 5, and including all of that paragraph down to and including the words, "or at all" on page 6.

Mr. Elliott: Line 14?

The Court: Line 14, yes. Thirteen on this copy.

Mr. Elliott: Yes, "admits that plaintiff received"——

The Court: "By the negligence of this defendant".

42 Mr. Curley: That ought to come out. That is negligence, down to the word "agents".

The Court: Down to and including the words, "or their agents".

Mr. Curley: Yes, on line 20.

The Court: Commencing with the words, "admits that plaintiff," on line 14 of page 6 of the answer——

Mr. Curley: Beginning with the word "but", your Honor, at the end of line 15—"but denies that said burns or injuries and the effects or results thereof, as described in said complaint," etc. In other words, lines 14 and 15 "admits that plaintiff received certain burns from said hot calcine mentioned and described"; that is proper; beginning with the word "but".

The Court: You will have to change the wording of that paragraph.

Mr. Elliott: It should read then, your Honor, "admits that plaintiff received certain burns from said hot calcine mentioned and described in said complaint, but denies that the injury or injuries of this plaintiff, if any he has received," skipping down to line 20.

The Court: "And the effects or results thereof", do you move to strike that out?

Mr. Curley: No, he is skipping from the word "complaint" line 15, to the word "denies" on line 20.

The Court: What do you want to strike out there?

Mr. Elliott: I suggest, your honor, that we strike out beginning with tht word "but" at the end of line 15.

The Court: Very well.

Mr. Elliott: Down to "and denies" at line 20.

The Court: It may be stricken out on motion of defendant. Now you had better commence with line 14 again and read it as amended.

Mr. Elliott (reading): "Admits that plaintiff received certain burns from said hot calcine mentioned and described in said complaint, but denies that the injury or injuries to this plaintiff, if any, he has received, as described in said complaint, or at all, were caused by the condition or conditions of plaintiff's occupation. * * * Further answering said complaint, defendant alleges that the injury or injuries received by this plaintiff as alleged in said complaint, or otherwise, if any there were, were received wholly and entirely by reason of the plaintiff's want of"——

43 The Court: Strike out beginning with line 30 on page 9 to and including the word "but", line 1, page 10.

(Counsel for defendant continues reading answer down to and including the words, "Such occasions, well knowing the danger".)

Mr. Kearney: If the Court please, I move to strike that out. He wouldn't be permitted to prove that on the trial, that plaintiff was negligent on some occasions, or the plaintiff was careful on other occasions. It is not a matter of proof in this case. He can only prove at the time this happened. A man may be ever so careful on some occasions and may be negligent on others. The fact that he may have been careful or negligent on other occasions is not a fact you can prove in this case. In the Circuit Court of Appeals in Clark vs. The Arizona Railroad, they expressly held that you could not prove whether the plaintiff was negligent on other occasions, or careful on other occasions, but you must confine the proof to that one particular time, whether he was careful or negligent then. It cannot be proved in this case that he was careless on other occasions. He may have been careless on other occasions and on this occasion been very careful. That does not establish the fact of negligence at all.

Mr. Elliott: While perhaps that does show whether he was careful or negligent on other occasions, it also shows what was the custom of Mr. Hammer as to what was necessary for him to do on other similar occasions.

The Court: Well, custom would not be admissible, but if the plaintiff at other times removed himself from places of danger, would not that be?

Mr. Kearney: No, that is what the Circuit Court of Appeals holds that you cannot do. You cannot introduce testimony of other occasions at all. It is confined to the particular time of the injury.

The Court: Would it not be admissible for the purpose of showing his knowledge of the danger incident to his remaining at that place?

Mr. Kearney: It is not admissible for any purpose. You simply allege negligence at a particular time. All negligence or carelessness at other times is eliminated, and we are confined to that particular time and place, or particular injury, and nothing else.

Mr. McFarland: If your Honor please, the rule stated by counsel is correct, but that isn't this case. That is where you seek to show upon other occasions a different line of work, possibly, and under different circumstances, that he had been either careful or negligent but this case, in this particular case that rule does not apply because this is a continuation of the same work at the same time and the same place. What did he do when the calcine car came up to him when he was fixing other hoppers? He got out, on notice from his helper. Why? Because he realized it was dangerous to remain in there—on the theory that one who knows of a danger and continues in the employment of the employer, without
44 objection, assumes the risk. He takes the risk. He would take the risk, he said to his helper when he told the helper to tell the motorman to come on. He said "I will take the chance." He took it; he takes the consequences. That is the assumption of risk.

The Court: Assumption of risk has no place in this case at all. You may show whether or not the plaintiff was negligent. What in your motion? Do you demur to that or do you move to strike?

Mr. Kearney: We move to strike it out. The Circuit Court of Appeals expressly referred to it there. It was one of the main issues in the Circuit Court.

The Court: Well, I will sustain the motion and will give you the benefit of an exception.

Mr. McFarland: Please note our exception to the action of the Court. If your Honor, please, in this connection, before I forget it, may I ask that our exception be noted to the action of the Court in overruling the demurrers to the amended complaint.

The Court: You may note the exceptions to the ruling of the Court on all pleadings.

Mr. McFarland: On overruling the demurrers to the amended complaint.

The Court: And also to the action of the Court in sustaining plaintiff's motion to strike.

Mr. Curley: That practically takes in all of paragraph 7 of page 13, I think.

Mr. Elliott: There is nothing other in that paragraph 7, I believe, your Honor.

The Court: No, the fact that the defendant alleges that the plaintiff had been engaged upon like work may stand.

Mr. Curley: You mean you will strike out then beginning with the word "defendant" on line 10?

The Court: I have sustained a motion to strike all that portion of paragraph 7 on page 13 of defendant's answer, commencing with the word "defendant" on line 10 and including the words "place of safety" on line 23, and you except to the ruling of the court.

Mr. McFarland: To which ruling of the Court we except.

The Court: Proceed.

(Counsel for defendant continues reading answer to and including the words, "by entering upon and continuing in said employment.")

Mr. Curley: We move to strike all of that paragraph.

45 The Court: Read the next paragraph and see whether that should not go out also.

Mr. Elliott (reading): "Further answering, defendant further asserts on the part of "defendant" that should be instead of "plaintiff."

Mr. Curley: I move to strike out both of those.

The Court: I cannot sustain a motion to strike, but I will permit you to file a demurrer to those paragraphs.

Mr. Curley: Well, at this time I will give notice that I will demur to the second paragraph, and I will put in a demurrer, a demurrer generally that it does not constitute any defense to the action.

Mr. McFarland: If the Court please, the pleadings are in such shape that it seems as if there will be a good deal of confusion in trying a case with the pleadings in this shape. I think the pleadings that we go to trial upon should be in a shape difference from this, for the convenience of the Court and understanding of the jury, and the counsel, as well. We have not filed an amended answer in this case because we did not know what to do until the ruling on the motion to strike was made. That upsets our answer and upsets the complaint, and puts the pleadings in bad shape. I think we could remedy that in a little while.

Mr. Curley: That isn't our fault, in your Honor please. The motion to strike was only filed yesterday, and this amended complaint has been filed quite awhile.

The Court: Well, this answer has been on file, Mr. Curley, since November 1st, and the motion to strike——

Mr. Curley: The pleadings have all undergone a change, however, since that time. You see the whole question of negligence on the part of the defendant has been subsequently eliminated so that the pleadings have undergone an entire change.

The Court: This question of assumption of risk, that could have been demurred to at any time long before the motion to strike was filed. Well, I will permit you to file your demurrer.

Mr. Kearney: The demurrer is filed, if I am not mistaken.

The Court: Well, it has not been ruled upon. It has not been brought to the Court's attention if it is there.

Mr. Curley: We will ask leave to file it at this time, if the Court please.

The Court: I will give you leave to file a demurrer.

Mr. McFarland: On the question of the assum-tion of risk?

The Court: Yes, and also the last paragraph, the pleading that the injury was not the result of the defendant's negligence.

46 Mr. Curley: Paragraphs 2 and 3 on page——

The Court: If you desire you may re-write your answer so as to eliminate all of the paragraphs of the answer which have been stricken out, or to which a demurrer has been sustained. But you need not delay the trial. You may do that at recess. All of the defendant's answer which has been allowed has been read to the jury. Do you desire to make a statement at this time, or do you reserve your making of a statement until after the plaintiff has finished.

Mr. Curley: Do I understand that your Honor has ruled upon the demurrer that I am interposing?

The Court: Well, I said I would give you leave to interpose a demurrer and they may consider it as filed.

Mr. Curley: I thought for the purpose of saving the record we would consider it as being filed, and during the noon hour I can prepare it and file it.

The Court: I say that counsel for the defendant will consider it as filed, and you need not delay the trial. The record may show the demurrer has been filed to the last two paragraphs of the defendant's answer, and that the Court sustains the demurrer, and to that action of the Court the defendant excepts.

Mr. Elliott: That is in paragraph 7, isn't it?

The Court: Oh, yes, it is in paragraph 7, subdivisions 2 and 3.

Mr. Elliott: Subdivisions 2 and 3, paragraph 7, the demurrer is sustained. To which action of the Court the defendant excepts.

The Court: Very well.

Mr. Curley: That isn't paragraph 7. It is another one. It is another and separate answer.

Mr. Elliott: It is the 7th paragraph of Subdivision 1.

Mr. Curley: Yes, 7th paragraph, on pages 13 and 14.

The Court: Yes, the whole of each of the paragraphs 2 and 3, pages 13 and 14 of defendant's answer. If there is any question as to whether or not you have reserved exceptions to the ruling of the court on the pleadings and motions and demurrers, you may have them at any time, but so far as exceptions to the introduction of testimony, as to the competency or admissibility of the testimony is concerned, those exceptions must be noted at the time, or they will be considered as waived. The same is true as to the general charge of the Court when it comes to charging the jury. If you have any exceptions to the general charge, those exceptions must be pointed out before the jury retires.

Call you first witness.

47 JOSEPH B. HAMMER, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name.
A. Joseph B. Hammer.
Q. Where do you live?
A. Morenci, Arizona, at present.
Q. In what county is that?
A. Greenlee County.
Q. How long have you lived in Greenlee County, Arizona?
A. About three months.
Q. How long have you been living in the State of Arizona?
A. A little over three years the twelfth day of October, last October.
Q. What is your place of residence? Where do you reside, Mr. Hammer?
A. Morenci, Arizona, now.
Q. Is that your home?
A. That is my home at present; yes, sir.
Q. Are you a registered voter there?
A. I am a registered voter at Clifton, Arizona.
Q. Did you vote at the last election there?
A. No, the election before.
Q. Where did you vote then?
A. I voted at Clifton.
Q. Does your family live there?
A. Family lives there.
Q. Where were you born, Mr. Hammer?
A. Pittsburg, Pennsylvania.
Q. Have you at any time since become a citizen of any other country than the United States?
A. No sir; always been a citizen of the United States.
Q. What is your business or vocation, Mr. Hammer?
A. A boiler-maker.
Q. How long have you followed that business?
A. Oh, I followed it here for the last three years, about, in the Arizona district. I worked about three years at it in Oil City, Pennsylvania; also worked at it in Signet, Ohio.
The Court: Mr. Hammer, the direct question was asked you, how long had you worked at the trade of a boiler-maker. Now in order that we may not take up too much time, endeavor to answer the question directly so that counsel can then ask another question. How many years have you worked at your trade?
A. Seven years and a half, all-told.
The Court: Well that is all right.

Mr. Kearney:

Q. Did you have any experience as an iron-worker?

A. Yes, considerable. It comes under the boiler-making trade. A good bit of that comes under the boiler-making trade here in Arizona.

Q. How many years' experience have you had in that line?

A. Well, that goes in with the boiler-making t-ade.

Q. Well, as an iron worker and a boiler-maker, how many years' experience have you had altogether?

A. Seven years and a half.

Q. For the past twenty years what have you been doing?

A. Well, I have been working three years at the boiler-making trade, and the balance of the time in the steel foundries.

48 Q. Did you ever hold a position of foreman of works and plants?

A. I held a position as foreman in several of them, superintendent of several of them.

Q. Can you name any of them?

A. Yes, sir.

Q. Do so.

A. Superintendent of the Bucyrus Steel Casting Company, Bucyrus, Ohio, and night superintendent for the American Steel Foundries at Indiana Harbor, Indiana.

Q. Well were you foreman of the Gould Car & Coupler Company?

A. Foreman at the Gould, thirteen months there.

Q. How long did you work for the Arizona Copper Company?

A. Arizona Copper Company?

Q. Yes.

A. I started October the 16th, 1912, and worked continuously for them with the exception of about three weeks we were laid off and about two months when I went up to Oklahoma, up to the time I was hurt.

Q. When you went to Oklahoma, they sent for you to come back?

Mr. McFarland: Well, now, if the Court please, I think that is wholly immaterial.

The Court: Objection sustained.

Mr. Kearney:

Q. Well, did you come back from Oklahoma to work for them?

A. Yes, I came back from Oklahoma to work for them.

Q. In the vocation which you follow, as a boiler-maker and iron-worker, what wages do they pay you a day?

A. It was fifty cents an hour up to the time they made the reduction, and they brought us down to $3.60; forty-five cents an hour.

Q. Well, before this at other places, did you receive that much wages or more?

Mr. McFarland: I object to that, if the Court please. It is not a question as to what he received at other places. The question is as to what he received at this particular place.

The Court: No, he may show what his earning capacity was.

Mr. McFarland: He can show what his services were worth, but

not what was paid him. That isn't the question. He can state what he go- there and what his services were reasonable worth. What he got does not constitute the standard, but he can state that fact himself.

The Court: No, I don't agree with you. The objection is overruled.

(Question read.)

A. I received more.

Mr. McFarland: We object to the question as to what he received from other places.

The Court: The objection is overruled.

Mr. McFarland: Exception.

Mr. Kearney:

Q. What wages did you receive?

A. I received $4.75 in Oklahoma, and we were getting
49 through our work in three hours and a half—two hours and three-quarters—three hours and a half to four hours every day for the Petroleum Iron Works of Shannon, Pennsylvania.

Mr. Kearney:

Q. The usual wages paid you for the labor you performed, average daily wages, what were they?

Mr. McFarland: I object to that, if your Honor please, because it might be under different conditions and a different employment.

The Court: Objection sustained.

Mr. McFarland: And the circumstances might be entirely different.

The Court: He may show what he received as wages at the various places where he worked since.

Mr. Kearney:

Q. Since you quit work for the—have the wages of the Arizona Copper Company for the same class of work, have the wages been raised?

A. Yes.

Mr. McFarland: I object to that. Just a moment, Mr. Hammer. Whether the wages are different now or different then——

The Court: You need not argue the question, Mr. McFarland. If you will just make your objection I think I can rule on that without argument. I sustain the objection.

Mr. McFarland: If your Honor please, if your Honor will pardon me, but the courts have said, the courts of appeal, that the reasons must be given in order that they may be reviewed in the court above.

The Court: I understand the reason. If the court overrules the objection, then you may give your reasons, but when I sustain your objection do you think it is necessary to state the reasons then?

Mr. McFarland: No, sir.

The Court: Well, then, I had sustained your objection. That

wages are being paid there now is not a criterion, but what wages this plaintiff has received during the past years would be.

Mr. Curley: You- Honor, the prevailing wage at the present time, would not that be a criterion in figuring what his damages are? For instance, this injury—if this injury has disabled him from performing that work, would not the prevailing rate of wage at the present time be a criterion in figuring damages?

The Court: The trouble about that is, Mr. Curley, you do not know that this plaintiff might be at work at that place, and what would have been paid would not be a criterion.

Mr. Curley: No, but in estimating the value of his services, would not the prevailing rate of wage be a criterion in estimating
50 the value of his services, if they have been destroyed?

The Court: That isn't the question. The question is what wages at that point were.

Mr. Kearney:

Q. What are the prevailing wages, say, in Greenlee County at the present time for the class of work that you were performing at the time you were injured?

Mr. McFarland: We object to that now, what the prevailing wages are. We have no objection to what the wages were then, but not now.

The Court: I will hear from you.

Mr. Curley: If your Honor please, in estimating a destroyed capacity, it isn't a question of what a man is earning at the time. The criterion is his ability to earn, whatever that ability, which has been destroyed, to earn is. Now at the time he was injured from force of circumstances or something else, he might have been carrying ashes at fifty cents a day, and yet he may have been a skilled workman. Now the criterion is not what he was getting at the time. The criterion is what ability to earn has been destroyed. You cannot confine him to the wage he was earning. A man may be earning fifty cents a day, and yet by reason of conditions he may have a profession that he has had destroyed that he was unable to use at that time. Now the criterion is his ability to earn.

The Court: At what place do you confine this question?

Mr. Kearney: To Greenlee County.

Mr. Curley: We are asking what is the prevailing wage at the present time in Greenlee County.

The Court: I overrule the objection.

Mr. McFarland: To which we except.

The Court: Answer the question if you know.

A. The prevailing rate, the scale, as the boiler-makers call it, is $4.72 for eight hours. I also know of one instance where a man is getting $4.80.

Mr. Kearney:

Q. Mr. Hammer, you state in your complaint here that you were

Arizona Copper Company on their new smelter at
rneath a track that runs from the roasters to the
ask you to describe this feed-floor and this track.
rom the roasters comes in on a circle.

ve you not prepared a diagram, a plat, of the work-

I have no diagram. I suppose the other parties
ts of that, or pictures of them. If they *will oan*
e we will get through it quicker.

rt: You should have had the plaintiff prepare one
ning into Court, the best he could prepare it. Go
lon't see how the jury is going to understand it,
ow I am going to understand it from a description
to illustrate. Go ahead.

ney:

ner, can you draw a draft of that feed-floor, or

less he can do it very quickly, I cannot suspend

y:

take but a moment, would it?

ell, go ahead. Have you a photograph of that

I have not, but I understand the defendant has

ll, that isn't the question. They haven't yet been
troduce anything.

: If you- Honor please, I said we had some expert
case, and one is here present—a resident of the
ite busy in his profession and would like to be ex-
I see no chance for the defendant to get to the de-
until late this afternoon anyway, probably tomorrow

e witness may be excused until three o'clock and at
determine whether or not it will be necessary for
nger.

If they intend to call the physician here who treated
ant to know it.

understand.

Doctor Smith is in the room here and he is the
ated the plaintiff.

ll he may remain in the court room.

And then he may testify to privileged communi-

ho is that?

Mr. Kearney: Doctor Smith, he treated the plaintiff at the time of his injuries.

The Court: Well, I do not understand that any man may testify to privileged communications.

Mr. Kearney: No.

The Court: If they are not to be examined as experts solely, they ought to be under the rule. If they are to be examined on
52 other subjects, then the defendant will have them in the room at its own risk, and the same applies to the plaintiff if any of your expert witnesses are to be examined on other subjects.

Mr. Kearney:

Q. Now, this map that you have prepared here, that is approximately correct?

A. Yes.

Q. Now, what does this represent here? (Indicating.)

A. This (indicating) represents the furnaces—these three long ones.

Q. "A" represents a furnace. And what does this represent, "B"?

A. That is a furnace.

Q. And "C"?

A. That is a furnace.

Q. And "Number 1" what does that represent?

A. Number 1 furnace.

Q. And "Number 2"?

A. Number 2 and Number 3.

Q. "Number 3" furnace?

A. Yes.

Q. And what is this running through here? (indicating)

A. That is the track.

The Court: By "this," you mean the double line running through, so that the reporter can get it.

Mr. Kearney:

Q. And the words, "Roaster, Roaster Building."

A. Yes.

Q. It is marked inside with an "X." Now, what is prepared in this place here, the Roaster?

A. Calcine, roaster ore.

Q. Where is that calcine taken after it is roasted?

A. It is taken around on the railroad to the furnace.

Q. Around the railroad to the furnace.

The Court: The railroad is indicated by the double line.

A. Yes.

The Court: Well, try and describe it because "this" and these" do not mean anything to the Reporter, you know, and the record should show it.

Mr. Kearney:

Q. What is the distance from the roasters to the furnace?

The Court: Around by the way of the track.

Mr. Kearney:

Q. Around by the way of the track.

A. Oh, it must be a thousand feet, probably more.

Q. Now, what is the size of those cars?

A. I don't know. I don't know the size of them. The capacity is about eighteen tons, I should judge. At least, that is what I understood.

Q. Haul eighteen ton of hot calcine?

A. Calcine.

Q. And then where is this calcine emptied from those cars?

A. Emptied into those little dots down through here. There is two there, (indicating) this fettling system.

The Court: They are marked how?

Mr. Curley: They are little dots.

Mr. Kearney: Each one marked with four little dots.

53 The Witness: There is another line of hoppers there also.

Mr. Kearney:

Q. Now, you spoke about certain hoppers. Where are those hoppers.

A. These, (indicating) the fettling hoppers.

Q. Yes. What is that out there? (indicating)

A. These four dots are the fettling hoppers, the ones that I was repairing or getting in shape for them.

Q. Are they underneath the track?

A. They are underneath, underneath the track.

Q. How high is this track elevated from the ground?

A. About eighteen feet.

Q. Then the furnaces are below the track?

A. The furnaces are below the track; yes sir.

Q. And these hoppers, how do they run?

A. The hoppers run continuously from the end of the furnaces here down to almost to the end, about up like that (indicating) about that line. And there is a small cross-track, cross-track here (indicating) that feeds them with smaller cars. They shove them around by hand so. They just run around on an I-beam, on a kind of a walk for a man to walk on, and he can dump it any place there—just a partition between them. They run continuous right through on both sides.

Q. How far underneath here are these hoppers, under the track? How far below the track, the surface of the track, this railroad track?

Q. This is the rail and a quarter of an inch sheet iron plate (indicating).

Q. How long are the hoppers?

A. The hoppers *is* about thirty-seven inches or thirty-eight inches long in between the standard-*guage* track, but after they get through

there I don't just exactly know the dimensions of them. They run continuously through there (indicating) with just partitions in between them. I don't know what the space is there. There is quite a few of them.

Q. What hopper were you working on when you were injured?

A. I was working on this here one here (indicating).

Mr. Curley: Which one, how are you going to designate that.

A. On the track that goes back to the west. There is two bins where they generally run back and get limestone.

Q. That is marked "C."

A. This furnace (indicating) was a dead furnace. It wasn't in operation; and this one (indicating) was dead; it wasn't in operation. This one (indicating) was in operation and we were getting this one (indicating) ready.

Q. You mean "B" and "C"?

Mr. Kearney: "A," "B," and "C."

Mr. Curley: "B" and "C" were not in operation?

A. Yes.

Q. Then you were working on "C."

A. Yes.

Mr. Kearney:

Q. What were you doing there at the time?

A. Putting an angle iron around under the platform on the little hopper so when the calcine was dumped down in so it
54 wouldn't splash over and get on the roof of the furnace,—to make it dust-proof.

Mr. McFarland: If your Honor please, I think the diagram has been explained. If the witness has concluded his explanation. I don't think it is proper for him to stand in front of the jury, if they understand the diagram.

The Court: I can hear better if the witness were sitting back here, but if they haven't finished with the diagram——

Juror Rider: Your Honor, may I ask the witness a question?

The Court: Yes.

Juror Rider: I don't understand and I don't think the jury understands the positions of the hoppers between the furnace and the tracks. I would like to get that in the description.

The Court: Now, I want to say to you gentlemen that any of you may ask any question at any time during the progress of the trial.

Mr. Kearney:

Q. You stated this was the railroad track, didn't you, running from the roaster down to the point "C"?

A. It is a double track, this track is.

Q. Standard-gauged track?

A. Standard-gauged railroad track.

Q. Now, right under this track are the hoppers, just underneath,

about thirty inches down below here, and those hoppers then run right down into the furnace underneath the track, is that right?

A. No.

Q. Well, get it right then.

A. These hoppers are right under the platform, and the rails is set on big I-beams to support them up from below, and then there is on the feed-floor, there is a space cut out here from these hoppers so a man can get down into it. It is thirteen inches by nineteen inches, the opening. These hoppers are riveted in on these I-beams. It is supposed to be continuous, but as they couldn't make them continuous, they are just made to fit in these two I-beams, on these tracks here, and the other ones on the inside run down, continuously down on both sides. So I was down in there cutting the angle irons to fit in around.

Mr. McFarland: Now, if the Court please——

Mr. Kearney:

Q. Now, the hoppers, as I understand, are just underneath, below the tracks?

A. Below the tracks.

Q. The railroad tracks pass over the hoppers, this line of railroad coming through here, and it passes right over the hoppers. Now, from these cars that contain the calcine, how does the calcine dump out of those cars into these hoppers?

A. Why, he steps over here and pulls the lever and allows as much to go down as he likes, and then shuts it off.

Q. Is there any opening in the bottom of this car to let the calcine out?

A. Yes, sir.

Q. That is worked by a lever, is it?

A. Yes, sir; that is worked by a lever.

55 Mr. Kearney: Do you understand?

Juror Rider: I still don't understand the shape of these hoppers?

A. The hoppers is shaped about like that (indicating) shaped round like that (indicating), put up in here and riveted in on these big I-beams, with little angle bars, riveted on the hoppers; you see, the rivet goes through this way (indicating) on them, and then the other rivet goes that way (indicating). They rivet through the I-beams to support them up, hold them up.

Q. How deep are they?

A. Well, when I stand up in them they are just about that high (indicating), oh, I should judge thirty some inches, thirty-two, three or four inches; something like that.

Q. That is, all of the hoppers?

A. There are two on each side, you see, under each track. When this car come in it brings it over here and gets back on this switch (indicating), and comes in on the other side and fills up the other.

Q. These are on top of the furnaces, between the tracks, these hoppers?

A. There is a pipe underneath them that they can work with a little lever, you understand. As they need the material a man down below can stand——

Q. That isn't what I mean. The hopper rests on top of the furnace in between the tracks?

A. Yes.

Q. And underneath the track then and on top of the furnace?

A. Yes.

Q. Is it straight in between the two?

A. Yes, just the same as if the furnace was on this level, (indicating), and the platform is here, (indicating) and that is covered over, and the furnace—we will say, that (indicating) would be the line, you see right there, (indicating) for the furnace. The tracks come across this way and the hopper is down there (indicating) and these continuous hoppers run from here (indicating) and the platform is here (indicating). But a wall runs down here by the furnace, you understand, and there is a little narrow track here, about sixteen or eighteen inches wide—I think it is sixteen—and there is half a dozen or so of them there, that run along the furnaces, and this man comes along with the silica or limestone, or whatever he has got, and he crosses with it onto the little track, and he can feed this hopper in that track with the silica, and he puts the calcine in the ones under this track. There is no platform over the other end of it. The platform is just where the——

Juror Moore: Do I understand the hopper is movable or permanent?

A. Yes, it is permanent.

Q. It is nothing more or less that a receptacle to receive the stuff that is dumped out of these cars?

A. Yes.

Q. And it takes it into your furnace. It doesn't move; it stays there.

A. It doesn't move. It is riveted right into the I-beams.

Mr. Kearney:

Q. What is this car moved by?

A. Electricity.

Q. Is steam used in the smelter?

A. Yes, they have steam, yes.

Q. For propelling machinery?

A. Not that I know of, only one pump, boiler pump.

56 Q. Do you know how many ton- of copper they make there a day?

Mr. McFarland: If the Court please, I object to that.

The Court: I couldn't hear that question.

Mr. McFarland: How many tons of copper they make a day at the smelter.

The Court: Objection sustained.

Mr. Kearney:

Q. When you were working at that smelter under whom were you working?

A. I was working under Mr. Fraser and Mr. Neilson.

Q. Did I understand you, Nielson and Fraser?

A. Fraser and Nielson.

Q. When you were working for them at the time you were injured on December 28th, 1914, what kind of work were you doing?

A. I was repairing a hopper, putting my angle bars in to make them dust-proof.

Q. Who requested you to do that?

A. Both Mr. Neilson and Mr. Fraser. Mr. Fraser put me to work on the job.

Q. What kind of work were you doing, you say; you were doing what?

A. Fitting these angle bars in there so that these bins would be dust-proof.

Q. Did they give you any directions; that is, Mr. Fraser or Mr. Nielson, about how to do this work?

A. No sir; they told me that is what they wanted done and for me to go on and do it and get my material wherever I could.

Q. And doing that kind of work, how many years' experience had you had?

A. Seven years and a half.

Q. Do you understand that work well?

A. Yes sir.

Q. And they simply told you to do it and did not tell you how to do it—told you what they wanted done?

A. Just told me what they wanted done and for me to go ahead and do it and use my own judgment.

Q. And on the 28th day of December, 1914, you were doing that kind of work, were you?

A. Yes, sir.

Q. Well, now, I want you to tell the jury what you were doing there at that time and what happened to you?

A. I was——

Q. What time of day was it, first?

A. Oh, it was sometime after one o'clock, or it might have been close to two o'clock; I can't just remember.

Q. Go ahead.

A. I was in this hopper—everything was all completed but this one angle bar, this one thirty-seven inches long, going into it. And on the ends of this cross-ways the other two was on, and also the one on the opposite side. Well, I had to get down in this bin and cross my feet in this shape (illustrating) and on account of being so large I had to work myself down in here and get my head back in order to measure them so as to get them in proper place, because one side of the angle bar on account of its width, the width of the other one would have to be cut off so that there would be nothing to stick out

over, so that they would fit tight up against the I-beam, fit
57 tight in the corner. There are rivets in there where the hopper is riveted onto the platform, and I had to mark off and cut out the holes for the rivets. I had plenty of room because the bin does not go up to an inch of the floor. When we got the angle bar in shape I bolted it in and then riveted it over the nuts and it made a pretty good job and strengthened the floor plates up. Well, I was in that position and this fellow drove in with the car. My helper hollered to me, he says, "He is coming." I says, "Just stay there a minute," I says, "and I will slip you out this angle bar," and I handed it out to him, and he put it to one side. And I had to turn myself in there in order to get around to get my feet around so I could raise myself up. It is pretty hard to get out of a place like that. These openings had been cut out with a round-nosed tool, and what they call a "rooter," a flat, blunt instrument, and shoved through with an air-gun, and it leaves quite a lot of burs and slivers on it, and it catched into your clothes. You have to get your arms up like that, (indicating), to get in a position to get out. Well, I got myself twisted around to come out, and just as I got my head up, why, the front of his car was about four or five feet from me, and he was still coming along slow, and the only thing—the only opportunity I had to save myself was to duck down in this manner (illustrating), or shape, like that (illustrating), and just about the time I got down, why, this calcine began to pour over on top of my head and down my neck, and that is when I told—when that happened I told him to keep agoing, keep agoing. I said that several times, but I hadn't said it until the calcine was on top of me. There was no other way for me to escape and I called to them to get the car over me so that I could get out. So he run partly over me and he stopped on account of my hollering in agony with the pain, and the helper had to tell him to go ahead and move the car off of me. He stopped for awhile and then he moved the car off just enough so I could possibly get out, and I just got my head out of there when Bentley run to my assistance and helped me up out of the hopper. The flesh and the skin on my arms hanging down like that (indicating), on both arms, and my clothes all on fire.

Mr. McFarland: Mr. Hammer, just a moment. I would rather Mr. Bentley would testify as to what he said and not Mr. Hammer. I object to what anybody else said.

Mr. Curley: He is stating his condition. He is stating that the flesh was hanging off his arms.

Mr. McFarland: I do not object to that. I am objecting to what he said Bentley said and did.

The Court: What is that?

Mr. McFarland: I object to the witness testifying what anybody else said or did.

Mr. Kearney: He said that Bentley helped him to get out.

The Court: Was that at the time?

The Witness: I am just illustrating to them the man that come and give me assistance first.

58 The Court: Well, I couldn't hear what the witness said about Mr. Bentley.

Mr. Curley: He simpley said that Mr. Bentley came and helped him out.

The Court: I understood counsel to object to the witness quoting Mr. Bentley. I did not hear this witness say anything that Mr. Bentley said.

Mr. Curley: I did not either.

Mr. McFarland: Well, the record will show.

The Court: Read that last statement of the witness.

(Answer read as follows: "He stopped for awhile and then he moved the car off just enough so I could possibly get out, and I just got my head up out of there when Bentley run to my assistance and helped me out of the hopper.")

The Court: The objection is overruled. Now, Mr. Hammer I will have to rule on all these objections as they are made, and although it is necessary for the jury to hear every word you say, it is also necessary that I hear; otherwise I won't be able to rule.

The Witness: Am I not speaking loud.

The Court: You are speaking loud enough, but if you will speak slowly and distinctly so all of us can catch what you say, it will be much easier for us to keep up with the testimony. Try and speak distinctly. Now you may proceed.

A. After I was released out of the hopper, why, they put me on a stretcher and started to take me to the hospital, carried me over this track about a thousand feet, about a hundred yards over there to the railroad track and got me on a hand-car that they have for that purpose, specially constructed, and I think there were four men went to the hospital along. It seemed to work quite well for a short ways. They had to keep pushing the car down grade, so finally we got to the foot of the grade in front of the A. C. new store and found out that one of the wheels would not turn—was sliding on the rail, and they didn't hardly have sufficient help enough to keep moving the car to the hospital. Finally they picked up a few men that was coming along the railroad track and give them some assistance. So I was taken into the hospital and was attended by the physician, wounds dressed up, and I was injected with some medicine—I don't know what it was—and eased up as much as possible. And I suffered everything, especially with my eyes, about four weeks, with the gas and the fumes and the sulphur from this calcine—almost ruined my eyes on account of keeping them open. The water just run out of them. Well, they treated my eyes, and these wounds was dressed every day, I believe, and I continued going to the hospital after I had left there. I left there January the 28th. I wanted to get home. My residence was just across the street, and I had my son and daughter help me over to the

59 house, that I would have better care with my wife than I would at the hospital. At least, I thought I would. And I was led back and forth from the hospital after that for two weeks to have my wounds dressed, and then I was strong enough to be able to walk alone, and I continued up to July the 2nd, and

the physicians had every possible show to do their work. There was no retractions. I stood everything, even let them tear my fingers, pull that finger (indicating) back and broke it all the way down here (indicating) in order to try to straighten it. They never gave me anything to try to relieve the pain, to ease the punishment and pain.

Mr. McFarland: Your Honor, I object to that testimony as to what the physicians did.

The Court: Objection overruled.

Mr. Kearney:

Q. When you were taken there did they put oil on you, or no?

The Court: I couldn't hear you.

Mr. Kearney: I asked if when he was taken there they put oil all over him. Never mind, we will waive that.

Q. Now, tell the jury how you were injured, how you were burned; what places were you burned. Tell the jury.

The Court: You may keep your seat, Mr. Hammer.

A. I am burned from my arms here (indicating) down both arms, all that flesh, all the skin off of that hand, and all—these were all burned right off. (indicating) That (indicating) is all new skin on there. And from here (indicating) down this leg to the top of that foot. And they had taken that shoe off of that foot, what was left of it. Just went up like that. (indicating) My clothes all on fire, burned over here (indicating) on this hip, right on the joint. The spot was that large (indicating). They took nippers and broke the crust off of that three or four days after I was in the hospital in order to get under it to clear it off. That is how badly I was burned. Burned on my head here, back of my neck and on my face here. (indicating) And spots on me here, (indicating)—just small spots. We never paid much attention to them.

Mr. Kearney:

Q. Now, what particular effect have those burns had upon you?

A. Why, it has got me about a nervous wreck. My stomach is very bad ever since. I have been on a diet, kept on a doctor's diet for several months there—have to be very careful what I eat and how much I eat and when I eat.

Q. How does that affect the strength of your limbs?

A. My limbs are weak.

Q. Take for instance, that left hand; what is the matter with that?

A. My left hand is crippled. I can't use the fingers of it, and I haven't any strength.

Q. Just come over here where the jury can see that and show the jury.

A. I can't move it around.

Q. Now, what effect has it had, the burns on your left hand? Can you use your left arm?

60 A. Why, I can get it back that far. (illustrating). And when I get it up any higher than that (illustrating) I have

a pain in here (indicating), right down through here (indicating), down through that shoulder, through here, (indicating). And where it burned so deep on the elbow I think it had some effect on the cords. I can't hardly get it back any further than that. (illustrating). The arm would be absolutely useless to me. I couldn't hold a hammer. I wouldn't have no stroke with it as a boiler-maker, with the left hand.

Q. What effect has it had on the left leg?

A. It has got my knee practically crippled, there, (indicating) where it catches me, just like cutting the knee-cap there where it has burned into it.

Q. Has that left that weak?

A. It has left it weak. I have pains down here all the time where these lumpy cords are all knotted up in here. (indicating).

Q. Have you been able to do any manual work since the time you were injured on December 28th, 1914? Have you been able to do any work?

A. No, sir, I have not been able to do anything.

Q. Do you still have trouble with you- stomach

A. Yes, sir.

Mr. McFarland: Now, if the Court please, I object to that. There is no allegation that his stomach is disarranged or ruined. The particular grounds of plaintiff's injuries are set up in the complaint, specifically, but there is nothing so far as his stomach is concerned. I know the rule where negligence is charged—under that rule he can generally prove anything, but when the specific acts of injury are set forth and the results of those acts, he is confined to those specific acts and results.

The Court: I don't recall any allegation that the plaintiff has suffered from any stomach trouble as a result of his injuries.

Mr. Kearney: No, it is a general allegation here. We can prove that certainly under a general allegation. We haven't got to prove the injury was to the body, to specify—that is never permissible; but if we specify a particular injury then probably we cannot prove any other. But we say on account of the injuries that he has been physically disabled and crippled, and then under the general allegation we can prove that condition and any of these ailments that did incapacitate him, whatever they may be. Now we say at the last that he was strong, healthy, able-bodied—never had any sickness, was intelligent and industrious. Here on page 4, paragraph 4, page 5. As a proximate result of said burns the left hand and arm of plaintiff is weakened and crippled and the left hand is rendered useless, on account of said injuries—injuries of fire—burns— is permanently injured and crippled. I am going to show that his stomach trouble results from the burns.

The Court: Well, that would be a matter of expert testimony, would it not?

Mr. Kearney: I am going to ask him if he had this stomach trouble before that time and follow it up and lay the foundation for the introduction of testimony on the part of the
61 experts.

Mr. Elliott: If you Honor please, in the complaint there

are set forth the particular burns, and then beginning on line 5, page 4, it says, "that as a proximate result of said burns the left hand and the arm of plaintiff was weakened and crippled." The particular injuries that they allege are that the left hand is rendered useless, the fingers and thumb of the left hand drawn out of shape, and the right hip injured, and the left leg injured. We certainly received no intimation that he had stomach trouble from this allegation. We would have a right to come into court and compel them to amend it and make it more definite and certain. We certainly cannot be called upon at this late date to meet a contention of which we have received no intimation, wherein the complaint enumerated the particular injuries for which he seeks recovery.

The Court: I will permit the plaintiff to testify, it to be a fact, that the sulphur fumes sickened him, but as to any injury which he now suffers, any stomach trouble, I think that is not claimed in the complaint and to that I sustain the objection.

The Witness: Why, your Honor, I have been treated for this stomach trouble by their own physician and another one.

The Court: I understand, Mr. Hammer.

Mr. McFarland: If the Court please, I understand the objection is sustained to that?

The Court: The complaint does not allege that the plaintiff's stomach has been injured in any way, and I am only ruling on the law of the case.

Mr. McFarland: Now, I move that all that part of the witness's testimony in respect to his trouble with his stomach be stricken from the record.

The Court: At the present time.

Mr. McFarland: Yes.

The Court: I will strike that portion of his testimony out, but that portion in which it is said that the sulphur fumes and some made him sick is not stricken out, and is for the jury to consider together with the other evidence in the case

Mr. Kearney:

Q. What other injuries did you suffer as a result of the burns?

A. Why general weakness—not physically able the way I was before the accident. I have never regained my weight or my strength.

Q. How long were you in the hospital?

A. Just a month.

Q. During that time what kind of diet did they put you on?

A. Why——

Mr. McFarland: If the Court please, there is no complaint about the diet in this complaint. He is not suing or not basing
62 his cause of action for the failure of feeding him on a particular diet, and as a result of that he is injured. I object to that.

Mr. Kearney: It is a foundation for something else.

Mr. Curley: If your Honor, please, will you let me say a word on this question of his stomach. The purpose of this testimony is not to show that it was from any burns on his stomach, but that the

injury to his stomach is one of the proximate results from the burns upon his hand and upon his leg, and the like.

Now the allegation here is, "and that the said hot calcine greatly burned the plaintiff on his head, about the neck, his left arm from the shoulder down was greatly burned, and the right hip and left leg all the way from the groin to the top of the foot were burned, and a burn on his right hip, and that said sulphur fumes sickened and stifled the plaintiff; that as a direct result of said burns the left hand and arm of plaintiff is weakened and crippled, and the left hand rendered useless, which has and will continue, to disable plaintiff from following his vocation as boiler-maker, steel foundry business and skilled workman, and that his fingers and thumb on his left hand are drawn out of shape and are useless in the performance of manual labor, and that his right hip is greatly injured and his left leg is injured, and that on account of said injuries the plaintiff has been and is greatly disfigured, scarred, crippled, and permanently injured."

Now he has been crippled and permanently injured. One reason that he has been permanently injured is the result of those injuries to his stomach. That has placed his stomach in such a condition. That is one of the results, one of the things that has made the injury a permanent injury, that there is a condition there—not from a direct burn, but as a consequence of the injuries to his hands and to his legs.

Now that is one of the causes of a permanent injury growing out of the injury to his hands and to his legs, just as much so, if your Honor please——

The Court: I don't care to hear any argument—any further argument. If you desire to amend your complaint by adding that, I will permit you to do so.

Mr. Curley: If you- Honor takes that view I will ask permission at this time to amend the complaint. But that is the idea, that there was no burning of the stomach, but that it was a proximate result.

The Court: I understand, but you can only recover in a personal injury case for the actual injuries sustained and alleged in the complaint. Whether you attempt to specify few or many, you are confined to those specified, as I understand the rule.

Mr. Curley: I don't know whether I made myself clear
63 or not.

The Court: Yes, you make it perfectly clear that those are the indirect, or direct results of the injury.

Mr. Curley: That those are the results of the injuries that we allege that he did receive. For instance, the injury to his arm and the injury to his leg, the burn on his head and face. There was no burn on the stomach, but the direct result of that—just as much so as the drawing up of his fingers. The permanency of the injury to his stomach is as much a direct result of that as the drawing up of the fingers of his hand.

The Court: I cannot agree with you, but I will permit you to amend.

Mr. McFarland: We will object to the amendment, if your Honor

please. We are not advised and we are not summoned to appear here to answer an injury resulting to his stomach from the injuries described in the complaint.

The Court: Objection overruled.

Mr. McFarland: To which we except.

The Court: You may consider the amendment as filed as of this time.

Mr. Elliott: We would like to see the wording of it.

Mr. Curley: It is now twenty minutes of twelve, and we can prepare it during the noon hour.

The Court: You may reserve that part of the examination of the witness.

Mr. Kearney:

Q. At the time you were in the hospital about a month there, state whether or not you suffered from pain?

A. Yes, I was under great pain. They kept injecting—I don't know what they call it,—with a needle in there to relieve the pain. The doctor, he would do that——

The Court: Never mind what the doctor did.

Mr. Kearney: Cut that out, what the doctor did, or what the doctor said, or anything you said to the doctor. You must not testify to that.

Q. Now, after you got out of the hospital did you continue to suffer pain?

A. Yes, I suffered pain continously. I suffer pain now.

Q. Not free from pain yet?

A. No.

Q. What particular pains do you have now?

A. My leg, my arm, my hip, my stomach.

Mr. McFarland: I move to strike out the stomach.

The Court: The latter part may be stricken out.

Mr. Kearney:

Q. Now, before the time of the injury, before December 28th, 1914, had you ever had any sickness?

A. No sir. Only small minor ailments.

64 Q. What was your physical condition on December 28th, 1914, just prior to your injury?

A. Good.

Q. What was your weight?

A. 225 pounds, working weight.

Q. And before that had you had any sickness?

A. No.

Q. Always been well?

A. Always been well.

Q. Vigorous and healthy?

A. Vigorous and healthy.

Mr. McFarland: Now, if the Court please, in asking these ques-

nsel should not lead the witness. I have indulged
o this time, but I think he should let the witness
lf.
ere is nothing before the court.
l: I object to counsel leading his witness.
ery well, at the proper time when the question is
will rule on it.
l: I object to the last question.
ell, it is too late now. An objection to a leading
made before it is answered.

ney:

ur age? How many years old are you?
his coming December.
ve any other injuries that you did not mention?
I have got them all, on my leg, and my head and
on top of my head and on my hip.
your memory, you mentioned your arm?
r here, my arm.

l: We object to any testimony on the question of
shoulder, for the reason that there is no allegation
that he received an injury on his shoulder, abso-
might just as well undertake to prove that he lost

hat is a part of his arm, isn't it?
l: No, I don't think so. There wouldn't be two
f his arm and shoulder were the same thing.
t is drawing a pretty fine line between a man's
arm.
u mean a burn on the shoulder?
No, a burn in here (indicating).
at isn't the shoulder.
In here, (indicating) the cord runs up into the

nderstand, but was there any actual burn on the

ss: No.
: Well, then refer to it as the arm.
: If your Honor please, it is quarter to twelve, now,
ould save time if we were to be permitted for the
which we can prepare that amendment, because
eal of the testimony we want to put in that we are
concerning his stomach. We would only lose
nd I feel that probably we will save time in the

ry well, Gentlemen of the jury, you will not dis-
ng yourselves, or permit anyone else to discuss it
or hearing. You will not form or express any
merits of the case until it has been finally sub-
Report at half-past one o'clock.

WED., Nov. 24th, 1915—1:30 p. m.

The Court: You may proceed.

Mr. Curley: If your Honor please, I have during the noon hour had page 4 of the complaint, the one that was interlined, re-written and I would ask leave to insert that in the original complaint.

The Court: Is that the one in which the interlineation was made?

Mr. Curley: Yes, I just had the young lady re-write the page. If your Honor will turn to page 5, I will indicate the amendment that I desire to make at this time. I have had that page re-written also. Now beginning at the top of page 5, "skilled workman, and that his fingers and thumb on his left hand were drawn out of shape * * * greatly and permanently reduced."

The Court: That goes farther, far beyond what you asked leave to insert.

Mr. Curley: I know, I was looking it over and the only part that goes beyond was the last portion there. I do not want to run up against that question, and while I think it is sufficiently pleaded, I thought that probably a general plea of that kind would be better, and I will ask permission to make that amendment.

The Court: What say you to the amendment?

Mr. Elliott: If the Court please, there is still a further addition that appears on page 4, six lines from the bottom of the page, "and that said sulphur fumes sickened and stifled the plaintiff." We have that addition.

Mr. Curley: Isn't that in on page 4?

Mr. Elliott: I believe not in the original.

66 Mr. Curley: It would be unless she made a mistake in copying it.

The Court: It is in the original complaint.

Mr. Elliott: I beg your pardon. It does appear there.

Mr. Curley: I think there is no change in page 4 at all.

Mr. Elliott: The amendment allowed by the Court, I believe, was to enable the plaintiff to bring in proof as to the injury to the stomach, resulting injury, and so on.

The Court: The question is are you prepared to proceed with the trial on the amendment. If not, I will give you a continuance.

Mr. Kearney: We do not want to insist on an amendment here if it is going to force us into a continuance.

The Court: Well, Mr. Curley, I have been so generous in granting plaintiff leave to amend his complaint again and again and have required the defendant to go to trial in the absence of material witnesses—put him upon the showing, and now——

Mr. Curley: Of course, we have admitted what that witness would testify.

The Court: I know, but that isn't like having the witness present, and I feel that if you desire to press the amendment to the extent that you have written it there, it would not be right to require the defendant to proceed with the trial.

Mr. Elliott: If your Honor please, we do not wish to proceed on that amendment.

Mr. Curley: Then I want to eliminate the objectionable feature, because we do not want a continuance.

Mr. McFarland: We are not prepared to meet that feature.

Mr. Curley: I had permission to amend about the stomach. Now the only additional feature there is that the plaintiff's ability to earn a living has been greatly and permanently reduced. I will eliminate that, if there is any question.

Mr. Kearney: It is practically in the complaint anyway.

Mr. Curley: It is practically in the complaint anyway, but I don't want to go beyond what the court thinks is right.

The Court: Now, let me see that amendment.

Mr. Curley: I think that the complaint takes care of it, but I might say I am not insisting on that last clause. I think the complaint is amply sufficient.

Mr. Elliott: Our objection is not alone to that, but as to the last clause.

67 Mr. Curley: I had permission to amend as to that.

Mr. Elliott: As to the stomach, as far as that is concerned, you did.

Mr. Curley: As far as the shoulder is concerned, if that is objectionable I will take that out. I don't care anything about that. If it is objectionable I will strike out everything but the stomach.

Mr. McFarland: We did not come here to defend against any trouble with the stomach.

The Court: How is that?

Mr. McFarland: We did not come here to defend on that. We did not know that they would amend and make that kind of a complaint, and we are not here prepared to defend as to it, or anything, except as stated in the original complaint.

The Court: That which is included within the brackets there will not be allowed, and I think I am going the limit in allowing you to make that amendment with reference to the stomach.

Mr. McFarland: That is the same as it was in the first place, with the exception of the allegation about the stomach, as I understand.

Mr. Curley: I don't know whether that makes good sense or not, "and that his stomach, and that his right hip is greatly injured."

The Court: Well, the stomach and the hip.

Mr. Curley: Yes, I guess that will make sense.

The Court: It is rather difficult by cutting out a part to make the sentence round out nicely, but it is the best that can be done. Come around, Mr. Hammer and take your seat.

JOSEPH B. HAMMER, the plaintiff herein, having been previously called and having testified in his own behalf, resumed the stand and further testified as follows:

Direct examination (continued).

By Mr. Kearney:

Q. Mr. Hammer, how hot was this calcine that poured in upon you?

A. Red hot.
Q. What is calcine composed of?
A. Different grades of ore. That is the way I understand it.
Q. How do they get calcine?
A. Out of the roasters.
Q. What is the process?
A. The process?
Q. Briefly yes?
A. Why, it is concentrated ores that are roasted in the roaster to a red-hot condition to burn the sulphur out of it.
Q. Well, is this ore or calcine that is brought in there, when it is dumped out does it contain sulphur fumes or not?
A. Yes, sir.
68 Q. A large quantity of them or not?
A. A large quantity.
Q. How does it come up when the calcine is emptied; does it comes up in a cloud?
A. It comes right up in a big cloud of smoke.
Q. Is it suffocating or not?
A. Suffocating, yes, sir.
Q. One working about that, has he got to wear any shield on his face?

Mr. McFarland: I object to it as a leading question.
The Court: Objection sustained.
Mr. McFarland: I insist now that the questions be asked in the regular way, and the witness not led.

Mr. Kearney:

Q. What protection, if any, do the workmen have to use as against the sulphur fumes?
A. They haven't any.
Q. They haven't any at all?
A. No, not furnished with any.
Q. Did you have any there at that time?
A. No.
Q. Yo spoke about an angle iron awhile ago. What is an angle-iron? What do you mean by that?
A. An angle iron is just the same as—you fit it in a square corner like that, (illustrating) three inches long on one side and three and one half on the other. It is a V-shape. It goes up into a corner and fits in. Part of it is along the side of the bin and the other part fits up against the floor.
Q. Are they supports?
A. They are supports when they are put into shape, yes, to hold the floor, plate of the floor down to keep the ore from going over in between the plate of the floor and the bin.
Q. How did you fasten those angle irons? How were they fastened to the hoppers?
A. They were bolted on and then riveted over the nut of the bolts.
Q. Bolted on from the inside of the hopper or not?

A. No, the nuts were put on the outside and riveted there.

Q. Do you make any holes inside of the hopper?

A. No, we cut the holes from the outside of the hopper.

Q. What were you doing there in the hopper?

A. Fitting an angle iron in the corners, cutting out the pieces, marking out the pieces so that they would fit in up agin the I-beam.

Q. Why is it necessary for you to go in the hopper?

A. It is necessary for me to go in the hopper to get the dimensions. There is rivets in there that you have to mark off to cut the holes out for the rivets, different places where the hopper is riveted onto the frame-work of the platform.

Q. Is that the customary way of doing that kind of work?

A. It is the only way you could do it.

Q. After your injury what was your weight? How much did you weigh after your injury? How much have you lost since?

A. Why, I don't remember what I exactly lost, but at present I am from seventeen to eighteen pounds lighter than I was. I weighed about 208 yesterday.

Q. What do you mean by I-beam?

A. An I-beam is a piece of iron shaped like a capital I. It comes across that way (illustrating) on both the bottom and the top, and the wood is in between.

Q. This work that you were doing there on the hopper, is that all the same as boiler-work?

A. Oh, yes.

69 Riveting?

A. Yes, sir; done as a class of boiler-work.

Mr. Kearney: I offer this sketch as Plaintiff's Exhibit 1.

Mr. McFarland: He hasn't proved it is correct.

Mr. Kearney: It is illustrating this witness's testimony, the one that he marked and explained to the jury here.

Mr. McFarland: It is illustrating if it is correct, and if the facts show it to be correct.

Mr. Kearney: I asked him if it is approximately correct.

Mr. McFarland: I have no objection, but I don't want the jury misled by an incorrect diagram.

The Court: Well, the witness may answer whether or not in his best judgment and recollection that is a correct diagram.

Mr. Kearney:

Q. What do you say in answer to the Court?

A. Yes, that is as good as I can make, unless I had a little more time. It explains it just exactly as it is there.

The Court: Any objection?

Mr. McFarland: Yes, I have, unless it is a correct reproduction of a situation attempted to be diagramed.

The Court: Objection overruled.

Mr. McFarland: Exception.

The Court: It may be received for the purpose of illustrating the testimony of the plaintiff.

(Paper marked by the Clerk, Plaintiff's Exhibit A.)

Mr. McFarland: If that is the purpose of it, I will withdraw my objection.

The Court: Very well.

Mr. Kearney:

Q. Now, you say you had some difficulties with your stomach. What *are* the nature of those difficulties, Mr. Hammer?

A. Why, a distressing pain across my stomach here, (indicating) more so when I am laying down to go to sleep, or retired at any other time—sickening, kind of like choking a man's wind off, like a cramp.

Q. When did this trouble first come on you?

A. The trouble first come on me that I noticed it severely about five weeks after the accident.

Q. During the five weeks after the accident that you were at the hospital, during that time did you eat?

A. No, I was on a diet, very light diet, nothing but broths and light food, very light food at that.

Q. And the same trouble is with you now?

A. Yes the stomach trouble is with me now.

Q. Before your injury did you have any stomach trouble?

70 A. No sir.

Q. Can you now eat all kinds of food, solid foods?

A. No sir.

Q. What is the effect when you do eat solid foods, meat?

A. Why, the effect is that it gives me a severe pain, and keeps me gulping up all the time—very much distressed.

Q. How are your nerves?

A. Oh, I am nervous.

Q. Do you rest well at nights now?

A. No, no sir. It always takes me about to two or three o'clock until I get to sleep. I have to lay this way (illustrating) in order to go to sleep. If I roll over on this hip, I wake up. If I get over the other way it is the same thing; my stomach bothers me.

Q. And the stomach trouble and the sleepless condition have only been with you since your injury?

Mr. McFarland: I object to the question.

The Court: Objection sustained. It is too leading.

Mr. Kearney:

Q. Did you have any of those difficulties before you were injured?

A. No.

Q. They have been with you since continuously?

A. Yes, almost continuously, yes.

Q. Mr. Hammer, if anyone wanted a boiler-maker or iron-worker, would they give you a job in the condition you are in now?

Mr. McFarland: I object to that question.

The Court: Read the question.

(Question read.)

The Court: The question whether they would give him a job would

not be the question, but whether he would do the work, would be able to do that class of work.

The Witness: No, I would not be able to do it.

Mr. Kearney:

Q. —.

A. I can't use my left hand. I have to have both hands to work at the boiler-making trade.

Mr. McFarland: I object to the argument succeeding the answer "no."

Mr. Curley: He is entitled to explain his answer.

The Court: I don't think that is argument. Objection overruled.

Mr. Kearney:

Q. Mr. Hammer, who is the person named there, "J. B. Hammer"? (Showing the paper to witness).

A. That is mine; that is myself.

Q. Whose signature is at the bottom of that?

A. A. R. Davis.

Q. What position does he hold?

A. Master mechanic of the construction work at the new smelter.

Q. You are the person named in that, as recommended?

A. Yes, I am the one.

71 Mr. Kearney: We ask to have it marked for identification "Plaintiff's Exhibit B".

Q. And the person here, "Joseph Hammer"? (Showing paper to witness).

A. That is me. That is Mr. Hardy, J. G. Hardy, master mechanic, operating department.

Q. Examine these two papers. (handing papers to witness)

A. Mr. Halter, boilermaker foreman, construction department. Mr. Halter also.

Q. Are you the person named in there?

A. Yes, I am the person, Mr. J. G. Hammer.

Mr. Kearney: I will ask to have these marked "Plaintiff's Exhibits, C. D. and E". That (indicating) is the one which has been offered in evidence.

Mr. McFarland: If your Honor please, may we be permitted to see them before they are introduced in evidence.

The Court: He does not offer those yet.

Mr. McFarland: I thought he was offering these papers.

The Court: They will be submitted to counsel for defendant before they are offered.

Mr. Elliott:

Q. Was this one from Halter here written in October, 1915, or 1913?

A. 1913.

Mr. McFarland: We have no objection to the certificates of competency and character and so on—those certificates.

The Court: They may be received.

Mr. Kearney: We offer them in evidence.

The Court: They may be received.

(Papers marked by the Clerk. Plaintiff's Exhibits B, C, D and E.)

(Counsel for plaintiff read Plaintiff's Exhibits B, C, D and E to the jury.)

Mr. McFarland: To save trouble, we admit that Mr. Hammer is a competent mechanic, and a capable one. That is all that these things could prove, and we admit that. We do not deny that. He sets them up in his complaint, and we don't deny it. It is admitted. Why take up the time of the Court to prove something we admit absolutely?

The Court: Well, in view of that admission, are there any further questions?

Mr. Kearney: Cross examine.

72 Cross-examination.

By Mr. McFarland:

Q. You say, Mr. Hammer, that you had been working at this particular work in which you were injured about seven and one-half days?

Mr. Curley: Years.

Mr. McFarland:

Q. Fixing angle irons on hoppers for—did I understand you to say that you had been working at that for how many years, twenty years?

A. No, no. I worked at the boiler-making about a continuous time of. putting it together, of seven and one-half years.

Q. You had been at this particular kind of work at which you were injured about seven and one-half years?

A. Yes, at the boiler trade.

Q. What?

A. At the boiler trade, yes.

Q. And this is a branch of what you call boiler-making?

A. Yes.

Q. Fixing these angle irons on hoppers?

A. Yes, that comes under the head of boiler-making.

Q. And is under the same business that boiler-making is?

A. Yes.

Q. Now, how many hoppers are there on that feed floor of the smelter?

A. Well, I don't know just how many there are.

Q. How many are there similar to the one that you were working on?

A. There is four of them small ones in between the two tracks, on

each furnace—four of them, if I remember distinctly, and I do, I believe, correctly. And then there is several larger ones on each furnace.

Q. How many hoppers are there on the feed-floor of similar size to the one that you were in at the time that you were injured, if you know?

A. There is four on a furnace, I believe.

Q. Four?

A. Yes, that is under the platform. I don't mean those that continue on to the end of the furnace, because I don't know how many partitions is in those, but they all belong to one group.

Q. Had you worked on any hopper similar to the one in which you were working at the time of the accident before.

A. Yes, I had been working out there for two weeks.

Q. What were you doing?

A. Making repairs on the floors and fixing the balance of these hoppers.

Q. Well, how many hoppers had you fixed prior to the one that you were fixing at the time that you were injured?

A. Well, I couldn't state just how many I had completed.

Q. As many as four?

A. This was the fourth one I was on on that furnace, yes. I had them all completed but putting this last piece of angle iron on.

Q. Then you had placed angle irons on three hoppers similar to the one that you were working in, before, before the one that you were then working in, the fourth?

A. Yes.

Q. Were the angle irons put on these three before in a similar way to the one in which you were putting angle irons on where you were injured?

A. Yes, sir.

Q. Exactly. And that was the purpose, of covering a space between the top of the hoppers——

A. And the floor.

73 Q. —and the bottom of the feed-floor?

A. Yes.

Q. So as to make the hoppers dus-proof?

A. Yes.

Q. Now, were you working on those other three hoppers, either one or the other, continuously, up to the time that you were working on the one in which you were injured?

A. No, not continuously, no. I was shifted to do other little jobs on the floor that was in a rush at times.

Q. But they were fixed, so to speak, within two weeks of the time of the one that you were fixing when you were injured.

A. Yes, we was up there—I should judge I was up there two weeks, or probably altogether—probably a few days more.

Q. And during that time, now, you were fixing these hoppers, these previous hopers that you have testified to; is that true?

A. Yes, I was fixing those hoppers, yes.

Q. You went from one to the other until you got into the one in which you were injured.

A. I kept agoing from one into the other, only at times when I was taken off of that job to do some other special jobs. There was some special jobs that I completed up there.

Q. I know, but when you were not.

A. When I was not on the special jobs I repaired back on the original hopper job.

Q. Well, with the exception of the time that you were working at some special job, you were repairing these hoppers on the feed floor?

A. Yes.

Q. About how much time was taken in these other jobs that you did while you were up there to work on these hoppers?

A. Well, now, that is a hard matter to say just what time, because I haven't kept any track of the time. I was kept busy. I am sure of that.

Q. That time covered what? two weeks, just approximately, I am not asking you to be accurate, approximately two weeks?

A. Why, as I mentioned to you that I was on the floor possibly two weeks, or a few days over, on all the different jobs that I was doing.

Q. Then when you weren't doing these other jobs you were working on these hoppers; is that the idea?

A. Yes.

Q. Now approximately what time was devoted in that two weeks or more to odd jobs, and what part of that two weeks or more was devoted to the repair of these hoppers?

Mr. Kearney: I object to that as not cross-examination.

The Court: Objection overruled.

A. Well, now, I couldn't state exactly the length of time.

Mr. McFarland:

Q. I don't want you to, Mr. Hammer. Just approximately as your memory now serves you. I don't ask you to be accurate.

A. I figured it taken me a little over a day at one of these hoppers.

Q. Took you a little over a day?

A. Yes.

Q. That would give you the time then that you had devoted to the three hoppers, approximately three days, one day to each hopper.

A. Yes, I was four days or more on them. You see, I had them all finished but just putting the bolts on and cutting this last piece of angle iron for the last one.

74 Q. Now, did you put these angle irons on by the same method. Did you put these angle irons on the hoppers which you had previously repaired in the same manner and by the same method as you did on the hopper in which you were injured?

A. Yes, they were all put on in the same system, yes.

Q. Same method?

A. Yes.

Q. Now is there any——

A. All with the exceptions of the first one.

Q. The first one?

A. Yes.

Q. What was the method pursued in putting angle irons on the first one?

A. With the exception of the first one, I didn't put the time in on cutting corners in close enough, and Mr. Neilson found objections to it. It left a small space, probably one-eighth of an inch, or three-sixteenths to a half an inch from the corner being tightly closed up.

Q. That wouldn't change the method, the system that you used to put them on.

A. Well, they are all put on about the same way, only it takes longer to fit them in more accurate.

Q. That is a question of time, not a question of system or method. Do you know any other method you could have pursued to place these angle irons on that hopper than the one that you did pursue?

A. There is no other way of doing this work.

Q. Then I understand you it is impossible to put these angle irons on these hoppers as you did put them on by any other method than the one that you pursued?

A. Yes, providing you want to measure them and fit them in.

Q. Providing what?

A. Providing you want to measure them and fit them in close the way they wanted the work done.

Q. Well, that would be the only exception, would it, where they wanted to fit the angle irons in close so as to make the hoppers dust-proof? Otherwise another method could be pursued then if you didn't want to do that?

A. Well, you have to do the work the way these people order it done. It ain't the way you want to do it. It is the way they order the work done. If they want a tight job, it has got to be that way.

Q. I understood you to say that you had no directions as to any particular method to pursue in placing these irons on there by the company, or any of its agents or employees.

A. Not by the foreman. He told me to use my own judgment. He told me what he wanted and put the job up to me, the way they always do.

Q. Then it was up to you to place them any way you saw fit?

A. Place them up in a mechanical manner, yes.

Q. No other method or system would be placing them there in a mechanical manner?

A. I don't know how it could be done.

Q. Couldn't one stand on top of that feed-floor and place those angle irons on that hopper, without going into the hopper? I will get you to look at that diagram. (Showing map to witness.)

A. These are your openings here? (Indicating.)

Q. Yes, Now I call your attention to the portion of this diagram which is identified by the letter "A", supposed to represent one of the hoppers about which you have testified, just under the feed

floor of the smelter. Now, does that figure there which is designated by the letter "A", is that a correct——

75 A. That is the correct shape, yes.

Q. —designation of that?

A. Yes, that is the correct shape of it.

Q. Of the hopper?

A. Yes, sir. Well, the hopper is wider than twenty-four inches.

Q. It is?

A. Yes, sir; it is twenty-six inches.

Q. Will you let me ask you the question and then you answer it please.

A. Yes.

Q. What is this (indicating) supposed to be, calling witness's attention to a projection from the hopper on the bottom of the same.

A. It is the feed-pipe that feeds the furnace through the roof.

Q. Then the furnace would be at the bottom of this pipe?

A. Yes.

Q. That is correct, is it?

A. Yes.

Q. Now, what would this indicate, this slanting mark, these slanting marks on either side of the top of the hopper?

A. That is the floor level.

Q. Now, you say that you were in this hopper, at the time you received this injury?

A. Yes, sir.

Q. How did you get into that hopper?

A. Through the opening.

Q. What is the depth of that hopper from the top of the feed-floor to the bottom of the hopper?

A. Thirty-two inches I think. I am pretty positive, yes.

Q. You aren't sure it isn't but twenty-four?

A. No, it is more than twenty-four.

Q. Now, in what position were you when the calcine car approached the hopper in which you were?

A. I showed you this morning. With my feet crossed like this (illustrating) and my head up above the floor, holding the angle iron with this hand (indicating) and marking it off with the other, in the corner.

Q. In what direction was your face from the car as it approached?

A. I was facing it.

Q. Facing the car as it approached?

A. Yes.

Q. And what distance were you from the car, would you say?

A. Well, I couldn't tell you the distance. I noticed the car when the helper first told me about the car coming.

Q. You saw the car coming then when he told you the car was coming?

A. Yes, I was turning myself around to get up and out.

Q. Well, how long were you getting out after you adjusted yourself, so that you could get out of that small hole?

A. I never got a chance to get out until after he run over me.

Q. But when did you first see the car? When did you first see the car when you were in a position that you could get out?

A. Oh, it was quite aways. I had to turn myself in there.

Q. I see. Before you could get out of the hopper?

A. Yes.

Q. And when you did adjust your body in such shape that you could, you did get out, didn't you, or not?

A. No, I didn't get out until after I was burned. The car was too close.

Q. When you got yourself in position so that you could get out, how far was the calcine car from you?

76 A. About five feet from the hole.

Q. At what gait was the car going?

A. Well, it would be impossible for me to tell you the speed. He wasn't going; he was coming.

Q. A couple of miles an hour?

A. Oh, I don't know.

Q. Slow was it, or fast?

A. It was medium slow, yes.

Q. Now, I want to call your attention to this. Do you recognize the line across the center of the diagram marked "fettling hopper" "F. H." hopper? What do you recognize those to represent?

A. They represent the fettling hoppers here.

Q. Fettling hoppers?

A. Yes.

Q. Well, now, were you in any one of these when you were injured?

A. I was in the last one up there, what they call the Number 3, and Number 3 furnace. Where is the Number 3 furnace?

Q. Well, what position was that hopper under the floor in reference to the points of the compass? Just state what it was, if it is north, south, east or west, or what.

A. This (indicating) is just the way—this is just the way the furnace sets there. Now this one here (indicating) is the one closer to the—you understand, we will take that for illustration. This middle one, this is a dead furnace, and this is the one up here (indicating) that I am working on, the third one up here, and the car comes in this way (indicating).

Q. What would be here? (indicating).

A. Well, you have only got two furnaces there. There is three of them.

Q. Yes here they are—one, two three. There is a hopper, here is one, here is one, here is one, here is one, and here is one—there are six hoppers.

Q. It stands just like that (illustrating). Now, unless you put the end of your furnace—now, you see, you have got your furnace here—there, this furnace here, this furnace here. This (indicating) is the standard gauge.

Q. There is the turn-table there, you see.

A. That turn-table ain't got anything to do with this standard-gauge track. That goes that way (indicating) crosswise.

Q. Now, Mr. Hammer, if you will pardon me, here are the stand-

ard-gauge tracks right here, and there are the little roads running across.

A. There, (indicating) is a calcine standard-gauge track right there. They come in like that. This (indicating) represents one furnace. Now, here we are (indicating). Now, this is the side we were working on, you remember. There are two other furnaces, you remember, two more sections like this here. I am working right in there (indicating).

Q. The furnace "on which I was working" is indicated by the numeral "1" in parenthesis. Now, had you fixed this one?

A. I had fixed these.

Q. There is 1, 2, 3, 4, and 5. You had fixed five?

A. No, I didn't say five. In fact I hadn't remembered that there were five.

Q. What do you say now?

A. Why I say there is six of them. There is one in between the two standard tracks, what I have worked on.

Q. You say that the furnaces that you had fixed previous to the one indicated by the numeral "1" in parenthesis are indicated by "2, 3, 4, 5, and 6". It that correct.

A. Yes, I worked on them all. I think the last one I——

77 Q. Now, you had worked on five of those hoppers similar to the one that you were working on at the time that you were injured, before you were injured?

A. Yes.

Q. And you pursued the same method in your placing of those angle irons on the five previous ones that you did on the one that you were working on at the time you were injured?

A. Yes.

Q. Which was by getting down into the hopper?

A. Yes, and measured the angle iron. That is the only way.

Q. To measure and place the angle irons in on top of the hopper, is that right?

A. On the side of the hopper and under the floor.

Q. On the side of the hopper and under the floor. Now, couldn't you have stood upon the floor, say that was a bar of angle iron and you wanted to place it under the floor, couldn't you have drilled holes through the surface and then have put the angle iron under those holes and marked them and bored a hole to correspond with the hole above; could you do that?

A. The holes in the floor was cut first from the top?

Q. Yes, cut first. Now, you have three holes in the top of the floor.

A. Yes.

Q. Couldn't you have taken that angle iron and slipped it under that floor and marked the places through the holes on the surface of the floor and taken the angle iron out and drilled holes through that?

A. No.

Q. You couldn't do that?

se I had to fit these and corners in here. Now I am
gle—there is an angle iron in here (indicating) and
nderneath the hopper—has to be shoved back there
probably if it was a little open, bent on the I-beam
the hopper, it has to be shoved in that much far-
is what made it necessary to get under there to get
sions so we could saw this off.
dn't be done by placing that angle iron under the
surface?
neasure it.
was it from the surface, from the surface here to
ed that angle iron back under there to this surface,
ce to this?
out nine inches, I should judge, on one side.
stand up on top of the floor and reach nine inches

after I had the angle iron fit so I could slip it in
ne, I could do it.
you do that with the angle iron in the corner?

n't reach nine inches?
can't fit the angle in. You can't fit an angle iron
work the way the work had to be done and do it
cause we tried to do it that way. I laid down on
I tried it and you can't see. You are in the dark
ave to have somebody to light you. It is a pretty

ave a light in there when you were fixing these?
light, yes. We were burning matches.
light you had to see by was from matches?
extension light at times, yes.
trying to get you to explain to the jury is why it
ou could not bore those holes through the plate
o of the feed-floor and then slip those angle irons
d mark through the floor onto the angle iron so as
e riveted on to the feed-floor or the hopper.
asy to explain that.
n it to the jury.
he holes has been cut through the floor first, and
ur angle iron back as far as the holes it has to be
listance measured and marked off and sawed out
p it behind this—this cross one here is about three
from going right—butting right in,—in order to
f of that angle iron to slip past that so that you can
so it would be a tight job. This is the last angle
t this job. There is no trouble keeping the angle
the holes off in the angle iron. If the angle iron
cut and the dimensions you want, you can slip
ith your hand. One man can't do it.
ron was simply bent at one end, wasn't it, and
r?

A. Not bent at all, it is straight.
Q. Fitted straight?
A. It is just the same here as if you cut this piece out. (illustrating).
Q. One side would go one way and the other the other?
A. Say I had an angle iron—is coming over here, coming up under the floor so. (illustrating) You have to cut a part of this one (indicating) that comes the other way out so that it will jamb up again these three inches or three and one-half, whatever the other angle iron might be.
Q. That couldn't be done from the surface?
A. No, sir.
Q. Impossible?
A. Impossible. It couldn't be done from the surface.
Q. What particular part of the work of placing this angle iron were you engaged at at the time the calcine car came up to you or onto you?
A. I was in there fitting it up in position and marking off the amount of it I wanted to cut out of each end.
Q. Now, I will ask you if you weren't in there engaged at that time in fitting these angle irons or placing them in such a situation that you could get the bolts through the surface of the floor and through the angle irons, so that you could screw them up and fasten them.
A. Why, that is easy done after the angle iron is fit you understand me. After the angle iron is fit all you have to do is just reach under the table and hold the angle iron in position, and you can stick on——
Q. I am asking you if the angle irons or angle iron wasn't fitted up for fastening to the hopper and the feed-floor before that car came up?
A. It wasn't fastened up in there, no.
Q. Weren't you fixing to fasten it by putting bolts through it?
A. No, I wasn't fixing to fasten it up by putting bolts through it. I was measuring it off, getting the dimensions for it.
Q. That is all right; you were measuring it—not attempting to fasten the angle iron on. That is the way I understand you.
A. Yes.

Mr. McFarland: If your Honor please, we will file this sketch of the situation there for identification.
79 The Court: It may be marked for identification.
(Paper marked by the Clerk, Defendant's Exhibit 1 for identification.)

Mr. McFarland:

Q. Now, Mr. Hammer, I understand you to say that you have been a boiler-maker and are familiar with the branches of that trade for twenty years.
A. No, I have worked at it almost thirty years ago, I said, yes.
Q. I will say then for thirty years.

A. But I haven't worked at it continuously. I do not admit I had.

Q. I am just asking you what the truth is about the matter. What do you say about it; how many years' experience have you had as a boiler-maker?

A. Seven and one-half years' experience as a boiler-maker.

Q. Now you have had seven and one-half years' experience in boiler-making, and during all that experience and observations never saw anyone place angle irons in that shape from the surface of the floor?

A. No, sir.

Q. Never did. You say it cannot be done?

A. Not in the position that I put that, it cannot be done. If they ain't fit close it can be done.

Q. Well, I would rather you answer the question, Mr. Hammer, whether or not it can or cannot be done. That is all the question I asked you.

A. It cannot be done in the manner that I was required to do it.

Q. Well, I am not asking you about that. I am asking you in the seven and one-half years' experience and observation in the trade of boiler-maker that you have never known that method to be pursued of placing angle irons on hoppers from the surface; is that true?

A. Not on hoppers of that style.

Q. You say it is a physical impossibility to do so.

A. Yes, and do the work the way it was required there at that place.

Q. It cannot be done where the work is required to be done as it was at that place?

A. Yes, sir.

Q. Now, in what respect is that work different from any other work in placing angle irons?

A. Why, it is that much different that this work had to be fit in there very tight and snug, and you had to get down in there to see what you was doing to measure. You couldn't do it in a haphazard way because they wouldn't accept the work.

Q. That isn't answering my question. That isn't answering it, whether your employers would accept the work or not. I am asking you whether it could be done.

A. No, I don't see how it could be done in any other way.

Q. Well, do you say now it can or cannot be done any other way?

A. It cannot be done.

Q. It cannot be done. That is the question and that is the answer that I want. You couldn't by standing or remaining on the surface of the feed-floor fit those angle irons in the position that you did fit them in any other way except by going down in the hopper?

A. I had to go in the hopper to do it; yes sir.

Q. And it couldn't be done any other way?

A. No, not that I know of.

80 Q. You tried it, however, didn't you?

A. Yes, I tried one of them and I was criticised on the work.

Q. When you started to try that didn't you consider that another method of doing that?

A. Why, I taken the best method to do that, the only method I could pursue whatever.

Q. Mr. Hammer, just answer the question. When you started to put those angle irons on from the surface did you consider that another method of performing that work.

A. Different style, yes.

Q. Then there are two methods by which that work can be done, aren't there?

A. Yes.

Q. If that is one that you considered and decided you couldn't do and the one that you afterwards adopted and did do, that constitutes two different methods.

A. There is only one method to do it and do it right. I told you I was criticized on the first job.

Q. There are two methods to do it wrongly? You say there aren't two methods of doing it rightly; are there two methods of doing it wrongly?

Mr. Kearney: I object to the question.

(Question read.)

The Court: I will overrule the objection, but I really do not believe that the witness understands.

Mr. McFarland: Well, I have been trying to get him to understand it, if your Honor please. I want to get the facts.

The Court: Do you understand what the last question means?

The Witness: I understand. Now, Judge, I am answering them just as honestly as I possibly can.

The Court: I understand.

The Witness: Now, when I say that I couldn't do that work the way it was required of me to do it, in any other way, I mean it couldn't be done any other way. I don't know of any other way of doing.

The Court: I understand. Read the question and see if you can answer the question. If you can, answer it; and if you cannot, say you cannot.

(Question read.)

A. Why, I don't believe I will answer that question, Judge.

The Court:

Q. Do you know how to answer it?

A. No, I wouldn't hardly understand the way to answer it. I don't see how there would be two ways of doing a thing wrong any more than there would be two ways of doing a thing right. But when there is only one possible way of doing anything, that is the only way you have to do it.

Mr. McFarland:

Q. Didn't you state in your examination in chief that the com-

pany directed you to go and place those angle irons there,
81 without any direction as to how to do it, and in what manner to do it?

A. No, they told me what they wanted, and I was told to use my own judgment by Mr. Neilson.

Q. And you did use your own judgment?

A. Yes, because I was always considered that I knowed more about boiler-making work than they—than he did, because he didn't understand boiler-making, the boiler-making trade as well as he does some other branches.

Q. So you used your own judgment in the way you did it and in the manner you did it?

A. Yes, I used my own judgment and the work seemed to be satisfactory.

Q. Did they say anything to you about not accepting the job if it wasn't satisfactory? You said you knew they wouldn't accept the job unless it was satisfactory. Did they say that?

A. I had stated to you that Mr. Nielson criticized me on the first hopper I fixed. Now, remember, I was in a peculiar position there. I was working under Mr. Fraser and also Mr. Nielson, and when Mr. Fraser would come up and ask me how I was getting along with the work, I would always give him an answer, give the answer, "very well," or something happened just as the case might be, and Mr. Nielson would come along and he would say "what did the old man say to you?" I would tell *me*. "Oh," he says, "nobody pays any attention to him around here." "Do this," he says, "use your own judgment and do it," he says. "So it is dust-proof," he says, "that is all we want."

Q. And you did it?

A. "And hurry up about it." He always put that "hurry up about it" in.

Q. Didn't he also at the same time, or about that time, tell you not to get in these hoppers, that it was dangerous?

A. No, he never told me not to get in the hopper at all. That is ridiculous that a man should come out and say that he give orders like that.

Q. I don't care about arguing with you on the subject.

The Court: Just answer the question.

Mr. McFarland: I would like the Court to instruct the witness not to argue the case.

The Court: Yes, just answer the question, and if it is improper your counsel will object to it.

Mr. McFarland:

Q. And didn't he tell you to place these angle irons where you did place them by remaining on the feed-floor and not go down into the hopper?

A. No sir.

Q. He didn't say that?

A. Never give me any orders to that effect.

Q. Did Mr. Nielson go up on the feed-floor when you started to place these angle irons and show you anything about it?

A. Yes, he explained to me naturally, as he would, as being the foreman, what was required there.

Q. And also how you were to do it, what method you were to pursue?

A. He didn't care what method I pursued as long as I got them in there so that they would be perfectly tight, tight joints in
82 the corners.

Q. That is all he said to you?

A. That is about all. He told me to get my material wherever I could get it, hunt up old scrap and get whatever I could get and do the best I could with it.

Q. Anybody present at that conversation?

A. Not that I know.

Q. Who were present at the time of this accident, so far as you know?

A. My helper and the man that operated the car.

Q. Two.

A. And Mr. Bentley was away a short distance from there. I don't know just how far.

Q. Was he on top of that feed-floor or under it?

A. He was standing on the air pipe on that same level with the feed-floor.

Q. Now you understood perfectly well, didn't you, that if anything should occur to the car there while it was passing from one end of this feed-floor to the other, anything should happen to the lever, that the calcine would be released?

A. How is that?

Q. Didn't you know that if anything should occur to disturb the lever in the course of the car's crossing that feed floor that it would be liable to release the calcine and spill it on the track?

A. Why, certainly we knowed that if something disturbed the lever that it would spill.

Q. Now, would you think it a very safe method to pursue in fixing those angle irons to remain in a hopper while that calcine car was passing over you?

A. Why, the car wasn't in sight when I went in the hopper.

Q. Well, wouldn't that be, if that were true? I meant to say that is true. Wouldn't that be?

A. Put the question again please.

(Question read.)

A. Why, it wouldn't be very safe, no. I wouldn't consider it safe.

Q. It wouldn't be safe?

A. No, I wouldn't consider it safe to be in it.

Q. Now, while you were placing these angle irons on the hoppers previously fixed by you, did you remain in the hopper or did you get out of the hopper when this calcine car approached.

Mr. Kearney: I object to that as not cross-examination and he

has no right to introduce testimony of other occurrences at other places, or other similar acts.

The Court: Objection overruled.

(Question read.)

A. Why, I had always been given an opportunity to get out before, you see.

Mr. McFarland: That is all; you need not argue. Had your helper always——

The Court: Well, he can explain if he so desires, having answered your question. I think he is entitled to explain.

83 Mr. McFarland: Well, that is permissible, if your Honor please, but I object to his arguing questions with me.

The Court: If there is any explanation you desire to make——

The Witness: Why, yes.

The Court: After having answered the question you may do so. Always first answer the question and then if you desire to make an explanation you will be permitted to do so.

The Witness: The same operator wasn't always on that same shift. The other operator that was on would always come down and tell us, "Now, come on" he says, "get out of there because I am going down such-and-such a place"—give us plenty of time. We had plenty of time and we always escaped, but we were always in the dread with this other man while he was on duty.

The Court: You see, that is going further——

The Witness: Well, I don't mean to take any advantage.

The Court: I know that.

Mr. McFarland: He may make any explanation that he pleases in conformity with your Honor's ruling.

The Court: Well, when I stop him I think he is going too far.

(Answer read.)

A. We always had been able to get out.

Mr. McFarland:

Q. Well, now, did you have any notice from anyone to get out at the car approached?

A. Why I had my helper there watching.

Q. He invariably notified you that the car was approaching when it was approaching?

A. Yes.

Q. And you got out from that place, from the hopper, out of the hopper?

A. To a place of safety.

Q. Yes, because you did not consider the hopper a safe place when the car was going along, did you?

The Court: He has already answered that.

Mr. McFarland:

Q. Now, at this particular time were you notified to get out and requested to get out when the car was approaching at the particular time that you were injured?

A. Why, he hollered down that he was coming down there, and he was in motion when he hollored, and I had the angle iron up, as I told you, marking it off and measuring it, and passed it out to my helper, and after I had passed the angle iron out I turned myself around to get up, so that I could get out, and when I got in a position where I could use my feet to get out, why, the car was within five feet of me.

Q. Now, Mr. Hammer, as a matter of fact, didn't you decline to get out of that hopper when your helper told you that the car
84 was coming up near the hopper—decline to come out and said that you had been annoyed by that car passing over you so much since you had been repairing these hoppers, and you had lost so much time in getting in and out that you weren't going to get out any more, and you stuck you- hand out above the hopper and motioned to him, and told the helper to tell the motorman to come on, and that you held your hand out of the hopper in view of the motorman, perfect view of the motorman, and motioned this way (illustrating) for him to come on, and you still remained in the hopper?

A. No, nothing like that at all.

Q. Nothing at all.

A. I never told him to go on until the frame of the car was pushing the calcine on my head, and I told him to go on.

Q. Didn't you tell him while the car was standing still twenty-five feet from the hopper that you were then in——

A. The car——

Q. I haven't finished the question—that you were not going to get out any more, that you had been annoyed by having to get out, had lost so much time by getting out of the hopper when this calcine car passed along that you would not get out any more?

A. No, I haven't told you anything like that.

Q. And didn't you tell the helper at that time when the car was standing still twenty-five feet away to tell the motorman to come on?

A. No, sir; I did not.

Q. And that after you told the helper that you put your own hand outside of the hopper in full view of the motorman, and motioned this way (illustrating), come on, while you were in the hopper?

A. No, I hadn't done that that I know of; no sir; and I was perfecly conscious.

Q. You are quite positive that none of those things occurred that I have asked you in this last question? You say you had different helpers while you were engaged in placing those angle irons.

A. What is that, Mr.——

Q. Did you say you had different helpers during the time that you were placing those angle irons on the hoppers?

A. Well, I think I had the one helper mostly all the time.

Q. Well, do you remember the name of the one that assisted you?

A. Let's see, Mauro Provencio, or some such name as that.

Q. Do you know the name of the motorman?

A. I know his name is Provencio, but I don't know his first name.

Q. Do you know another Provencio; did you see another Provencio there at that time?

A. No, I didn't see another Provencio there.

Q. Well, you knew that if any obstruction on the track should strike that lever underneath the car, calcine car, that it would be likely to release the calcine, the hot calcine, would it not?

A. Why, probably it would.

Q. It probably would. You are familiar with that car, are you not, that was hauling the calcine?

A. I don't know just how the gate is put in that car.

Q. What?

A. I never worked on the car, not on the gate.

Q. But you knew it contained calcine, hot calcine?

A. Yes, I——

Q. And you knew that calcine was released by a lever?

A. Yes, sir.

85 Q. The lever worked under the bottom of the car?

A. Worked on the side of the car.

Q. Well, it was released on the bottom, wasn't it?

A. Yes.

Q. Anything that would interfere with the lever would likely release the hot calcine on the track it was going over, wouldn't it?

A. Yes, very likely would release it according to whether it hit it right.

Q. Well, wasn't it for that reason that the foreman told you that it was dangerous to work on the inside of that hopper; for that reason put those angle irons on from the top?

A. The foreman hadn't told me it was dangerous.

Q. He didn't tell you?

A. No, sir.

Q. You knew it yourself without being told, didn't you?

A. Certainly, I realized it was dangerous.

Q. What did you say the prevailing wages in that camp up there, Morenci, Clifton, and Duncan were?

A. At the time of the strike, of the close-down there, the way I understand it, it was $4.72 for eight hours.

Q. Well, you mean there is a strike up there now in Clifton?

A. Yes, what they call it. When the strike started I mean, when the close-down was.

Q. You said, as I understood you, that the average wage scale so far as your department was concerned, or your vocation was concerned, was now—was $4.72½, wasn't it?

A. No, I said——

Q. $4.72, four dollars and seventy-two cents?

A. Yes, and I said that I also——

Q. Now, is there anyone being paid $4.72 wage scale up there now in your business?

A. At the time of the close-down yes.

Q. I mean now.

A. Now?

Q. Yes.

A. I don't know. I don't know whether they are paying anything. There ain't anyone working that I know of.

Q. Well, I understood you to say that the wage scale now was $4.72.

A. At the time that this strike took place first, when they closed down.

Q. You aren't in that strike, are you?

A. No sir.

Q. Are you allied with any association that is in that strike?

Mr. Curley: I object to the question.

The Court: What is the question?

Mr. McFarland: Allied with any association or union that is connected with that strike.

Mr. Curley: That is objected to as improper.

The Court: Objection sustained.

Mr. McFarland:

Q. Didn't you say in your examination this morning that the only thing to do when you were injured was to fasten an angle iron up to the under surface of the floor; that your work was done there except that one thing, just one iron placed up against the——

A. Yes, it finished that hopper.

Q. Just the one iron?

A. Just the one iron.

86 Q. Was that iron on the side or in the corner?

A. It was the side iron, lengthwise.

Q. Side. So up to that time you had finished the iron in the corners, angle irons in the corners? The other ones were fixed?

A. Around the three sides.

Q. There was only one bar to go up?

A. One more to be fitted in place.

Q. You were fitting that in at that time?

A. Yes, sir.

Q. And not attempting to fasten it to the surface?

A. No, I wasn't attempting to fasten it.

Q. Now, among other injuries, did you say you received at that time an injury to your hand, to your left hand?

A. What is that?

Q. Among other injuries that you say you received from that accident, was there an injury to you left hand?

A. Yes, sir.

Q. Can you use that hand now?

A. Yes, I can use the fingers and the thumb a little bit.

A. Can you use the other three fingers?

— No, I can just move them slightly. I can't hold a hammer in it, or any tool, or anything.

Q. You have the use of your thumb and your first finger?

A. Just slightly, like that (illustrating).

Q. Have you any difficulty in handling papers if they are in your hands?

A. No, not if I can get hold of them.

Q. Now, were you treated for that trouble of your hand? Were you treated by anyone for that trouble?

A. Yes.

Q. Who was it?

A. Doctor Elliott and Doctor Smith.

Q. At the hospital in Clifton?

A. Yes, sir.

Q. Well, now, after they had treated you as far as they did treat you—now, after they had treated you to the extent that you were treated, while you were in the hospital and after I will ask you if it wasn't possible by a further treatment to have practically reduced that lame hand to normal?

Mr. Curley: I object to the question. It is calling for an expert opinion.

The Court: Read the question.

(Question read.)

The Court: If he can answer it, he may. It does call for an opinion, but if this witness can answer it, he may do so. If you cannot answer it, say so.

The Witness: I can answer it if you will let me answer it the way that I want to answer it. Let me answer it out full the way the matters come up, and I will answer it.

Mr. McFarland: I have no objection to your telling the jury just the situation and the facts. I want to get at that point; that is all.

The Court: Just state.

A. Doctor Smith and Doctor Goodrich——

87 Mr. Kearney: You are not a physician and the question there is whether you are skilled enough to know whether that cured or not. They are asking for your personal skill or knowledge in treating such injuries as that, and whether you would know or not if it could be cured by treatment.

The Court: Read the question.

(Question read.)

The Court: Well, in view of the fact that it is not shown that this witness has any knowledge of medicine or surgery I will sustain the objection.

Mr. McFarland:

Q. I will ask you if it wasn't possible, and if it wasn't a fact, that within two or three months after this accident, for you to straighten these two fingers on your left hand out practically straight this was, (illustrating) and if you did not do it, or if it wasn't done in your presence?

A. Will I answer that?

The Court: Yes.

Mr. Curley: Just answer the question whether it was possible for you to straighten them out or not.

A. No.

Mr. McFarland:

Q. And since that time if you haven't manipulated these fingers to any extent at all and they have become as you hold them there now in your left hand.

A. I din't quite understand that.

Mr. McFarland: Read the question.

(Question read.)

A. They are the same now as when the treatment was stopped.

Mr. McFarland: I don't think that is an answer to the question if the Court please.

The Court: He asked you whether or not you had continued to manipulate those fingers.

A. Why sure as much as I could.

The Court: That is what he wants to know.

Mr. McFarland:

Q. Have you been treated at all for that hand, that left hand, since you left the hospital?

A. Have I what?

Q. Been treated by a physician?

A. By any physician?

Q. For the trouble in that hand, that left hand?

A. Been treating it by any physician?

Q. By any physician.

The Court: Since you left the hospital.

A. No, I haven't had no physician, no.

88 Mr. McFarland:

Q. You have never been treated for it since you left the hospital?

A. No.

Q. Didn't your physicians at that time tell you that with proper treatment that that hand could be restored to normal and that you refused to have that treatment performed on that hand for that purpose?

Mr. Curley: Just a moment, in order not to open up any way for that class of testimony, I object to it as being a privileged communication.

The Court: Well, this is calling for the witness's——

Mr. Curley: It calls for what the physician said to him, advised him about his hand.

The Court: Well, while you may not examine the physician without the plaintiff's consent, is there any rule which provides that he may not be required to answer that.

Mr. Curley: We might just as well examine the physician if he can be compelled to answer.

The Court: Not at all. Suppose he denies it. You cannot introduce the physician to refute his statement.

Mr. Curley: But suppose, your Honor, he is asked about some

question that he could not deny. I don't know what his answer would be to this, but suppose he was asked about some matter that is privileged between him and the physician, and he could not deny it. He would have to admit it. It would then cease to be privileged.

Mr. McFarland: If your Honor please, we will withdraw that particular question.

The Court: Very well.

Mr. McFarland:

Q. Now, about two months after this accident and your injury, and after you had been treated about that length of time, didn't your physician advise you that by a slight operation that hand could be restored practically to its normal condition?

Mr. Kearney: I object to that on the ground it is privileged.

Mr. McFarland:

Q. And so as to be a fairly useful hand?

The Court: Objection overruled.

Mr. Curley: We will take an exception.

The Court: Very well, he may answer.

(Question read.)

89 A. He advised me to have them fingers broke down with — or as useful as this one; and they told me they couldn't give me any positive assurance, but the best thing *would* do would be to break them down, and when they healed up, and if they remained stiff, so I could not use them, the best thing would be to amputate them afterwards. So I made up my mind I wouldn't have it done. I had no guarantee that the hand would be any better than it is now.

Mr. McFarland:

Q. Now, Mr. Hammer, you say you suffered from your stomach?

A. Yes, sir.

Q. How long after the injury did this trouble come onto you?

A. I think it was on the fifth week before I had the very severe spell.

Q. Are you satisfied in your own mind that that difficulty in your stomach was caused from the injury?

A. Yes, sir; by the advice of Doctor Elliott and also Doctor McPeters. They both told me the same thing.

Mr. McFarland: If your Honor please, I move to strike that out. I didn't ask him what Doctor McPeters said, or Doctor Elliott.

The Court: Objection sustained.

Mr. McFarland: I did not know what his answer was going to be. He got it out before I could object.

The Court: Well he said he is satisfied, yes, and then he proceeded to state what somebody else told him. Now his answer to your question may stand.

Mr. McFarland: My question was I think what he considered.

The Court: He has answered that he was satisfied, and then he began to give his reasons for it.

Mr. McFarland: I move to strike out all after satisfied.

The Court: It may be stricken out.

Mr. McFarland: Do you know of any other cause that would produce stomach trouble except burning on the arm and hand, and so on?

Mr. Curley: I object to that question, as calling for an expert opinion.

The Court: Objection overruled.

A. No, I don't see——

Mr. McFarland:

Q. Any other causes that you know that will produce stomach trouble besides burning on the hand, arm and leg?

A. I don't know any other cause that would cause it, no sir.

Q. You don't know of any other cause?

A. No, I am not familiar with any other cause.

Q. You think that is about the only cause that would produce stomach trouble, so far as you know?

90 A. Well, in my case.

Q. I mean generally.

A. I have no knowledge of what would cause it, no.

Q. Did you ever see anyone that had stomach trouble that had not been burned?

A. Yes, I have heard of them, yes.

Q. Well, then stomach trouble wouldn't necessarily come from a burn, would it?

Mr. Kearney: I object to the question. He is not an expert, or a physician on such things.

The Court: Well, I permitted him at your solicitation to answer with reference to this stomach trouble, and if he can answer it, he could answer that question.

(Question read.)

A. Well, I don't want to answer that question unless I am compelled to, Judge, with your permission.

The Court: Well, I think that is a matter of common knowledge anyway. Almost everybody knows that any person might have stomach trouble whether they are burned or not.

The Witness: Yes.

Mr. McFarland:

Q. Now, where did you get those angle irons that you were placing on that hopper that afternoon?

A. Where did I get them from?

Q. Yes.

A. Picked them up in the yard down in that boiler shop, in the scrap pile.

Q. Did your helper bring up any at that time?

both went down when we went after the angle irons,

ay did you bring and how many did he bring at that

on't know. We brought up the set.

ween us.

y, I will ask you this question: Didn't he give you the ought up, and wasn't that the one that you were fit- that the calcine car came up?

now whether it was the one that he brought up or was fitting in the one and passed it out to him.

l you recollect about it?

ll I recollect, yes. I couldn't tell you which one he

t know whether it was the one he brought up or the ought up that you were fitting in there at that time?

atch you, Judge.

don't know whether it was the angle iron that your up or the one that you brought up that you were ne of the injury?

't know whether it was the piece I brought up, one t I brought up, or one of the ones that he brought

nd: That is all I want to ask you. I think that is or please.

examination.

Mr. Kearney:

this hopper on which you received the injury was use; had they been using that to dump the calcine furnaces, or not?

as a dead furnace. The hopper wasn't in use.

ne next to it dead?

the hopper next to it?

as it in use?

the two hoppers beyond where you were the first sed?

't using any of the hoppers on that furnace I was

ow many are there?

Six of these little hoppers, Judge.

l in a row?

n a row, two sets.

ney:

using that furnace then?

rnace was a dead furnace. They were just getting mall wood fire in there heating it up.

Q. Then there was no occasion for them to dump calcine at all in that hopper that you were working on?

A. No sir.

Q. They were using the first furnace, the second furnace beyond you?

A. That was the first furnace that was in use. I was at the last one.

Q. You say that you motioned for the car to come on ahead, and it was about five feet from you. Why didn't you get out instead of motioning the car to come ahead?

A. I couldn't get out. I had no possible chance to get out.

Mr. McFarland: That same question was asked and answered this morning, why he couldn't get out.

The Court: I beg your pardon.

Mr. McFarland: It is simply for the purpose of saving time. He is going over the same ground.

The Court: Yes, I think he has answered that, but let the answer stand.

Mr. Kearney: That is all. Stand aside.

The Court:

Q. Do you know what caused the calcine to come through that car at that particular place at that time?

A. No sir; I couldn't tell you why it did, Judge.

The Court: That is all. Stand aside.

Juror Meyer: May I ask the witness a question?

The Court: Yes.

92 Q. Had a similar accident like that happened to your certain knowledge?

A. No, not similar to mine, no.

Q. Or had at any time any of that calcine been spilled that way that you know of?

A. Yes, the trestle that the car comes in on is all sheeted over.

Q. Well, I mean had it accident-ly dumped out the way it did upon you that day?

A. It hadn't dumped on anybody, no, but it had spilled before.

Q. It had spilled?

A. Yes, because you could see traces of it all along the track.

(Witness excused.)

ELMER BENTLEY, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. State your name?

A. Elmer Bentley.

A. Whereabouts do you live?

A. Clifton, Arizona.
Q. What is your vocation, Mr. Bentley?
A. My location?
Q. What is your vocation, what do you follow for a living?
A. Stationary engineering.
Q. How long have you followed that work?
A. About seven years.
Q. Have you had any experience as a boiler-maker?
A. No, sir.
Q. Do you know anything about that kind of work?
A. No, sir.
Q. Do you know the plaintiff, Mr. Hammer?
A. Yes, sir.
Q. Were you working for the Arizona Copper Company at its new smelter on December 28th, 1914?
A. Yes, sir.
Q. And did you see the plaintiff there at that time.
A. Yes, sir.
Q. I will ask you if you remember the time that Mr. Hammer was injured, that is, on the 28th day of December, 1914?
A. Yes, sir.
Q. At that time and just previous to the time he was injured, what, if anything, were you doing?
A. I was working as repairman there at the smelter.
Q. As repairman?
A. Yes, sir.
Q. Do you know what kind of work Mr. Hammer was doing at that time?
A. Mr. Hammer was working as repairman also.
Q. He was working as repairman?
A. Yes, sir.
Q. You were doing the same kind, the same character of work, were you?
A. Yes, sir.
Q. Then you do know how that kind of work ought to be done, don't you?
A. Well, I wouldn't call repair work boiler work, no.
Q. Well, then would you or would you not know how that kind of work should be done which Mr. Hammer was doing?
A. I would, yes sir,
Q. At the time he was injured how far were you away?
A. At the time Mr. Hammer was injured.
93 Q. Yes sir.
A. I was about twenty-five or twenty-six feet away from him.
Q. And at that point were you at work?
A. No, sir, I was waiting there for orders from Mr. Nielson.
Q. I wish you would tell the jury in your own way now what you heard, and what you saw pertaining to the injury of Mr. Hammer.

Mr. McFarland: It depends upon who was speaking whether it would be material or not.

The Court: How is that?

Mr. McFarland: If it was someone speaking who had a right to or had authority behind him, it would be perfectly proper and right, but if it was somebody who was an outsider, or some fellow who happened to be there and had no business there, who was speaking for anybody, I would say it would be wholly immaterial, and I think the proper way would be an avowal of counsel that the conversation that he is seeking to produce here is one between certain parties who had authority to speak for the defendant. Now, he couldn't show what the plaintiff said, because the plaintiff can speak for himself.

Mr. Kearney: He may state if he heard cries of help from the plaintiff.

Mr. Curley: And what he did.

Mr. Kearney: And what he saw there.

Mr. McFarland: That would be perfectly proper, I should think, if he knew it was the plaintiff.

The Court: Well, the last question is the question that you desire the witness to answer is it? The last question is the question that you desire him to answer?

Mr. Kearney: That is what I expect him to answer.

The Court: Very well, he may answer. Tell what you saw and heard.

A. Well, I was standing up there and it was about 1:30 on this day, and Mr. Nielson asked me out there in front of the reverberatory to do some pipe work and Mr. Nielson was down on the ground, you understand, in front of the reverberatory, and I was up on top, and this calcine car come in over the tracks where Mr. Hammer was working, and I was sitting there facing the car, you see, and in a little while I heard Mr. Hammer holler. So I looked around in his direction, you see, and I called to Harry Nielson to come up on top of the reverberatory for him, and I run over to him. I saw this Mexican helper just motion the car ahead. That was to clear him so that he could come up out of the floor, and I run to him and helped him out.

Mr. Kearney:

Q. The car that spilled the calcine on him did you see that coming?

A. Yes sir.

Q. How far away from where he was working was it when you first noticed it coming?

94 A. How far was he away when I first noticed it coming?

Q. From the hopper where Mr. Hammer was working was the car when you first noticed it?

A. Well, I should judge it was two or three hundred feet away. It was coming in under the sheds there. It was coming in over the top of Number 1. I heard it coming in over the floor.

Q. Did that car at any time stop before it reached the hopper where Mr. Hammer was working?

A. It did not.

Q. Now, you went up there, I understand you to say, and helped Mr. Hammer out. Now what was his condition there?

A. Sir?

Q. What was his condition there?

A. Well, he was afire. His hat was afire and his clothing was afire all along this side, (indicating), and his shoes was afire, and he was part way above the hopper, I should judge, about here, (indicating) when I grabbed hold of him—had his head and shoulders up above the hole.

Q. Was he able to get out of there without help?

The Court: What is that?

Mr. Kearney: Was he able to get out of there without help.

Mr. McFarland: I object to that. I think that is improper. He cannot tell whether he was able or not.

Mr. Kearney: From his own personal knowledge.

The Court: He may tell what he did. His opinion as to whether or not he was able, I think is objectionable.

Mr. Kearney:

Q. Well, what would you say from what you saw or did whether,—in your opinion whether he was able to get out without assistance?

Mr. McFarland: I object to that. He hasn't qualified as an expert.

The Court: No, I say I sustain the objection to that question as calling for this witness's opinion as to whether he was able, but I will permit this witness to testify as to what he saw and what Mr. Hammer's condition was, and what he did toward helping him out.

Mr. Kearney:

Q. What was Mr. Hammer's condition there at that time?

A. Well his condition—condition was that he was overcome by the fumes and the gas and he was afire, and the flesh and skin was hanging down off his arms and hands when I got to him. That is his condition.

Q. State whether or not there was a large amount of sulphur smoke and fumes there?

A. Yes, sir.

Q. Did the car contain that with the calcine?

A. Yes, sir.

The Court: Mr. Kearney, I am not sure whether the jury hear all your questions or not. Now, you see, unless they hear your questions what this witness says is wholly unintelligible to them, and it is to me. I cannot hear what you say.

95 Mr. Kearney: What is the difficulty, hearing me or hearing the witness?

The Court: Well, I think both. For instance, when you put your hand to your mouth I cannot hear a thing. This room is difficult to hear in, no matter who is talking, but unless you—if you lower

your voice at all the jury cannot hear half you say, and it is very difficult for me to rule on objections when I do not hear the question.

Mr. Kearney:

Q. Mr. Bentley, I will ask you to speak a little louder?
A. Yes, sir.
Q. So that the jury can hear you. Now, you may state what was the condition of Mr. Hammer at the time you saw him there.
A. Mr. Hammer was on fire when I saw him there, and the flesh was hanging down off his arms and his hands, and he was afire practically all over, and I tore the clothing off of him, shoes and all.
Q. Now, as to there being a large quantity there of sulphur fumes and gas, what do you say as to that?

Mr. McFarland: I object to the question. There is nothing to show that there was any there.
The Court: Well, he has already stated——
Mr. Curley: He has already stated there was.
The Court: —in answer to a similar question which I think the jury did not hear.
Mr. McFarland: Well, I object, if your Honor please, more from the point of repetition.
The Court: Well, I think in view of what I said to counsel that he is justified in asking this witness to repeat.
Mr. McFarland: It is the repetition that I object to, asking a question and repeating it three or four times in succession, as he has asked this witness to repeat the condition of Mr. Hammer when he first saw him.
The Court: He has stated that. Now he is asking him whether or not there was any sulphur fumes there, and in view of what I said to counsel in reference to speaking louder I think he is justified in repeating the question. You may answer, Mr. Witness.

A. Yes sir; the fumes from the calcine was strong.

Mr. Kearney:

Q. How much calcine had poured in and upon Mr. Hammer?
A. I couldn't say as to how much, but it was about a foot or so in the hopper.
Q. How hot was that calcine?
A. Dark red.
Q. Do you mean red from heat?
A. Yes, sir.
Q. Did it contain great heat then?
A. Yes, sir.
Q. What is its normal color without being heated?
A. Its normal color, why it is different colors, just black and gray when it comes from the roaster, when it is first taken from the roaster.
Q. It is ground-up rock, isn't it?
A. Sir?

Q. It is ground-up rock, isn't it?
A. Yes sir.
Q. Well, at that time did you notice any particular injuries to Mr. Hammer?
A. Not in particular, I was busy getting his clothes off and holding the man up, you see.
Q. State at that time what his condition was—Mr. Hammer's—how did he act?
A. Well, he acted very helpless at that time. He was helpless, you might say. I called for help to help hold him up.
Q. And who helped you?
A. Billy Morris.
Q. Was there a Mexican there?
A. There was.
Q. Did they assist you?
A. No sir.
Q. Do you know the man, the Mexican, that was helping him there?
A. I do.
Q. Do you know the one that was managing the motor car?
A. I don't know—by sight—I don't know his name.
Q. Did he offer you any assistance there?
A. No, sir.
Q. Then what did you do with Mr. Hammer after that?
A. I got him out of the hopper, pulled him out of the hole and taken him over to one side where it was cooler, away from the fumes and smoke and heat, and I sent Harry Neilson for a cup of water, and I sent his helper for the stretcher.
Q. What did you do with the stretcher?
A. When the stretcher came we laid him down and put him on it and carried him to the depot and took him to town.
Q. And where then?
A. To the hospital I suppose. I didn't go into town with him.
Q. Did you visit the hospital afterwards?
A. Yes, sir.
Q. You saw him there?
A. Yes, sir.
Q. Do you know what his condition was there at the hospital?
A. Well, he seemed to be suffering a great deal at times.
Q. At the time he was burned until he was in the hospital do you know whether he suffered much or not?
A. Yes sir; he did. The way he was carrying on I should judge he did. He must have in the condition he was in.
Q. Did you notice at the time any burns on his head or neck?
A. I did, yes sir.
Q. What particular burns did you notice?
A. I noticed the one here (indicating) on his head where the hole was in his hat, you see, and the one on his neck here (indicating).
Q. Did you notice other burns?
A. On his arms, and hands, yes, sir.

Q. His feet?
A. Yes sir, this leg (indicating) was burned the worst, I noticed, when I was taking the clothes off.
Q. What was his condition with reference to the burns?
A. Sir?
Q. What was his condition with reference to the burns?
A. Well, I could see they were serious.
Q. How badly was his leg burned?
A. The leg burned?
Q. Yes.
A. Bad enough to take the flesh and hide with it.
Q. Did you ever do any of that kind of work that Mr. Hammer was doing there at that time?
A. Have I ever done any of it?
Q. Did you ever do any of it?
A. Yes, sir.
Q. You knew about his putting angle irons in there then, didn't you?
A. I did, yes sir.
Q. Now, to mark those off and put them in there, could he do that without going down into the hopper?
97 Mr. McFarland: If the Court please, I object to that. That isn't the rule at all.
The Court: Read the question.
(Question read.)

Mr. Kearney:

Q. Angle irons?
A. No sir.
Q. In order to do a good job and put those angle irons in, it was necessary to go into the hopper?
A. Yes, sir.
Q. Had Mr. Hammer anything to do with managing that calcine car?
A. Did he have anything to do, you say, in managing the calcine car?
Q. Yes, bringing it up or down the track?
A. No sir.
Q. Was that in charge of another person?
A. Yes sir.
Q. Now, the hopper in which Mr. Hammer was working, was the company using that on that day to put hot calcines in?
A. No sir.
Q. Were they using the hopper next to it for that purpose?
A. No sir.
Q. How far away were those hoppers? I mean from the furnace, these particular hoppers that run from the furnace that they dump the hot calcine in to have it conveyed to the furnace, about how far were they apart?
A. Well, the laundry that the calcine is dropped into is all one

long hopper cut off into divisions, you see. It has got divisions in through it.

Q. Now, was there on that floor one of those hoppers, or one of those furnaces in use or not?

A. On this furnace, were they in use then?

Q. Yes.

A. No sir.

Q. Well, there are three furnaces down there at the smelter, around there on that floor, aren't there?

A. Yes sir. There was one of the reverberatories in use; yes sir.

Q. One of the reverberatories in use?

A. I understood you to say was the one on these hoppers in use.

Q. Now with reference to the roasters where the hot calcine comes from, was there—the one it came to first—was the first reverberatory or first hopper, was it in use or not?

A. You say did the car come to the first reverberatory or not?

Q. No, the one that is in use, was it the one that is closest to the roaster?

A. Yes sir.

Q. Well, then, the one that Mr. Hammer was working in was the one that is furthest from the roasters, then, was it?

Q. It was; yes sir.

Q. And before the car came to where Mr. Hammer was working it had to pass Number 1 reverberatory or furnace, didn't it?

A. Yes sir.

Q. And the hoppers attached to that were not in use, were they?

A. They weren't; no sir.

Q. So regardless of whether Mr. Hammer was in that hopper or not on that day, that hopper was not in use, nor used to receive any hot calcine?

A. No sir.

Q. Now, I wish you would describe to the jury—tell the jury what those hoppers are, how they the situated with reference to the feed-floor.

A. With reference to—what they are used for?

Q. Yes, how they are made, how they are situated with reference to that feed-floor.

A. Well, you see, they are in a laundry shape. They are three feet deep, and this hole that Mr. Hammer was down in was
98 cut through plate boiler iron, and the hole is thirteen inches wide by nineteen inches long. The hoppers are made so that they have three fettling pipes. They come out of the bottom, you understand, and go down to the reverberatory. That is for fettling the furnace, and I believe there is three pipes to each hopper, three sixty-inch pipes to each hopper. And the laundry, as I said before, it used in fettling the furnace. They let this hot calcine down in the furnace. That is used for fettling the furnace. So that it won't cool the charge in the furnace, they put it in there as hot as they can get it.

Q. What size was that hole? That hopper that Mr. Hammer went into, what are the dimensions of that?

A. It is three feet wide by three feet deep, and the entrance where Joe went in is thirteen by nineteen.

Mr. McFarland: I did not understand that.

A. Thirteen by nineteen, the hole where he was in.

The Court:

Q. Do you mean by that that his feet were only nineteen inches below the surface of the track?

A. No sir, the hopper, you see, is three feet below the track.

Q. And then nineteen inches below that?

A. No, the hole where he went through, you see, was cut in this boiler plate. It was thirteen inches wide, the hole was, by nineteen inches long. That is just a little door, you see. That is in the center of the hopper. The hopper, I should judge, is three or four feet long; I wouldn't say positive. It is three or four.

Mr. Curley:

Q. By the "hole" you mean the opening by which he got into the hopper?

A. The opening, yes sir, the opening in which he went in is nineteen by thirteen.

Mr. Kearney: Cross examine.

Cross-examination.

By Mr. McFarland:

Q. You say your business is stationary engineer?

A. Yes sir.

Q. Were you engaged in that business at the date of the accident to Mr. Hammer? I didn't understand you, what you testified.

A. I did not understand the question.

Q. Were you engaged in that business——

A. No sir.

Q. —on the date that Mr. Hammer—that you said that Mr. Hammer was injured? You were not?

A. I was not, no sir.

Q. What were you doing?

A. I was working at the repair work.

Q. Now, where was the position that you occupied from the point where Mr. Hammer was injured?

A. I was standing at about forty-five degrees from where Mr. Hammer was.

Q. When he hollered?

A. Yes, sir.

Q. That is the first time you knew that anything was the matter with Mr. Hammer?

A. Yes sir.

Q. You hadn't observed anything in that direction before that?

A. Nothing more than the car coming in.

99 Q. You saw the car coming?

A. Yes sir.

Q. And you say that was on the track leading to the point where he got the calcine?

A. No, it was coming from the roaster down with the calcine.

Q. Was it inside of the shed or outside?

A. It was inside the shed.

Q. How far would that be, then, from the point where Mr. Hammer was in the hopper; about how far?

A. I don't understand how you mean. All three of these reverberatories——

Q. Well, when you first saw the car how far was it from the point where—from the hopper where Mr. Hammer alleges he was injured? Was it right over the hopper or was it some distance from it?

A. How far was the car from Mr. Hammer?

Q. Yes, the car.

The Court: When you first saw it.

A. It pulled off of him about two feet.

Mr. McFarland:

Q. It was about two feet then, the first time you saw it?

A. It pulled off of him, I say, of the hopper where he was about two feet.

Q. That is the first time you saw it?

A. Yes sir; I saw the Mexican boy motion the driver ahead so that he could get out.

Q. Was that the first time you saw the car?

A. No, sir; I saw the car coming in.

Q. When you first saw it then how far was this car from the hopper where Mr. Hammer was injured, when you first saw it?

A. It was I should say one hundred feet east.

Q. Did you watch that car come up to the hopper where Mr. Hammer was in?

A. I did.

Q. Kept your eye on it all the time?

A. Yes sir.

Q. You usually do that when cars are passing you?

A. Yes sir; I usually do on that floor out there, because it is a dangerous proposition to be around there when a car comes in there.

Q. You are quite positive that car never stopped until it passed over Mr. Hammer?

A. Yes sir.

Q. Had you been attracted to Mr. Hammer before you heard him holler?

A. Sir?

Q. Did he holler before the car passed over him?

A. Not to my knowledge; no sir.

Q. When was it, when the car was over him or after it had passed beyond him that you heard him holler?

A. After the car had passed, he was hollering when the car slowed down, you see.

Q. Slowed down?

A. Yes sir.

Q. After it had passed over the hopper in which Mr. Hammer was putting on these angle irons, how far had it passed that hopper befor you heard him hollering?

A. Heard Mr.——

Q. Heard Mr. Hammer holler?

A. Why, I heard him hollering as soon as the car had stopped there.

Q. How far had it passed this hopper he was in when he hollered, you heard him holler?

A. It wasn't passed at all. He was hollering when the
100 car stopped.

Q. Well, the car was over the hopper, wasn't it?

A. Yes sir, he was hollering then, and I saw this Mexican boy motion the car ahead off of him.

Q. That is when the Mexican boy motioned?

A. The motorman drove the car on ahead.

Q. You saw no motion by anybody prior to that time?

A. Sir?

Q. You didn't see anybody motion to the motorman to come on prior to that time?

A. No sir.

Q. You are quite sure the car never stopped?

A. Yes sir; I am.

Q. Went right along over this hopper that he was in?

A. Yes sir.

Q. How far did it go before it stopped?

A. After the boy motioned on ahead it moved a couple of feet, I should judge.

Q. Then it would be a couple of feet past the hopper?

A. Yes sir.

Q. And you are quite sure now that you saw that car from the time it entered on the feed-floor of the smelter?

A. Yes sir.

Q. And it never stopped until it passed over the hopper in which Mr. Hammer was engaged in putting these angle irons?

A. I am.

Q. You are sure about that?

A. Yes sir; I am.

Q. Couldn't be mistaken about that?

A. Not very well, because I have been working up there myself a good many times myself, and I have got chased down off the floor with the fumes of it when they would charge the furnace.

Q. If Mr. Hammer were to say that the car stopped before it come to the hopper in which he was you would say he was mistaken, wouldn't you?

A. I would, when I was standing there watching it.

Q. You couldn't possibly be mistaken?

A. Well, I possibly could; yes sir.

Q. You could be?

A. Yes sir; I possibly could be mistaken but I am quite sure it didn't stop.

Q. But you are as well satisfied that you are correct on that proposition as you are on anything else that you have testified to?
A. Yes sir.
Q. Equally as confident on that subject?
A. Yes sir.

Mr. McFarland: That is all.

(Witness excused.)

Mr. Kearney: At this time I will introduce the table of the life expectancy.

Mr. McFarland: We are willing the Court should instruct the jury on the life expectancy.

Mr. Kearney: At his age, fifty years, the expectation of life is 20.9 years.

Mr. McFarland: Well, whatever that expectancy is, we are willing that the Court instruct the jury without any other proof.

101 The Court: Is that the American Mortality Table?

Mr. Kearney: This is the American, based on the American, yes.

The Court: Very well, if counsel makes no objection, I shall instruct the jury on that subject, at the proper time.

Mr. Kearney: Now, if the Court please, we have at this time a stipulation here that a certain witness, John Holtz, if he were sworn as a witness on this trial, he would testify as in this stipulation stated.

The Court: File your stipulation.

Mr. McFarland: We admit that he was a good, competent workman. I don't see how a man as good and as competent a workman as he could ever get in this situation.

The Court: Very well you may read it.

(Counsel read stipulation to the jury.)

The Court: Gentlemen, it is admitted by counsel on both sides as to a stipulation on file, by both counsel that if that witness were present he would give the testimony contained in this stipulation that has just been read to you.

MEADE CLYNE, M. D., called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curley:

Q. State your name, Doctor?
A. Meade Clyne.
Q. What is your business or profession?
A. Physician and surgeon.

Mr. Curley: Will you concede the Doctor's qualifications to testify?

Mr. Elliott: Certainly.

Mr. Curley:

Q. Doctor Clyne, state whether or not you have made a physical examination of Mr. Hammer, the plaintiff in this case, within the last few days.

A. I have.

Q. When?

A. It was yesterday morning.

Q. State what you found upon that examination his physical condition to be.

A. I found a number of scars from burns on different parts of his body. I made some notes at the time of the location of the burns.

Q. You may refer to a memorandum which you have.

(Witness consults memorandum.)

A. The location of the scars, there were a number on his left leg, one on his right hip over his hip, and some on his left arm, and some weak scars on his right wrist, right forearm. There were also a scar—scars about his head, rather

102 Mr. Elliott: If your Honor please, you will remember the attorney put that question to him and we objected and the question was withdrawn.

Mr. Curley: That is my recollection of Mr. Hammer's testimony.

The Court: I don't think that Mr. Hammer said that he had been on broth diet for three months.

Mr. Curley: He said they kept him on broths.

The Court: I understood him to say five weeks myself, but I might be mistaken, and if there is any question about it I will permit you to ask a question of Mr. Hammer as to when he began to take solids into his stomach.

Mr. Kearney: We might call him to the stand again and ask him that question.

The Court: Very well, ask him where he is. Just keep your seat.

Mr. Curley: Mr. Hammer, during the time that you were in the hospital you testified this morning that you were upon a diet?

Mr. Hammer: Yes, sir.

Mr. Curley: Of what did that consist?

Mr. Hammer: That consisted of light foods, broths and soups and teas and a glass of milk.

Mr. Curley: Did you take any solid foods, any meat or anything of that nature, into your stomach during that time?

Mr. Hammer: Yes, very little, though, very light.

Mr. Curley: To what extent?

Mr. Hammer: Oh, on several occasions.

Mr. Curley: During the time that you were in the hospital?

Mr. Hammer: Yes.

The Court: For how many weeks?

Mr. Hammer: I was in the hospital just one month from December 28th, until January 28th, and the following Sunday after that is the Sunday that I thought I would take a little solid food, when

I had the very severe spell of the stomach trouble, from that on for several months after.

Mr. Curley: Of what did that solid food consist?

Mr. Hammer: Just a small piece of meat and a few potatoes.

Mr. Elliott: I wish to ask Mr. Hammer a question. While
103 you were on that diet, Mr. Hammer, didn't you also have soft food such as eggs, and oatmeal?

Mr. Hammer: Yes, eggs several times, yes.

Mr. Elliott: How long did that continue?

Mr. Hammer: Why, that continued for quite awhile, and then when I had the bad spell, I was under treatment for the first spell by Doctor McPeters, and he warned me and told me that if I wasn't very careful——

Mr. Elliott: Objected to.

The Court: You need not tell what he told you. The question is did you eat eggs and oatmeal during that time?

Mr. Hammer: Yes.

The Court: Go ahead now and put your question.

(Question read as follows: Assuming Doctor, that Mr. Hammer was in a healthy condition, strong, robust, healthy condition, with no stomach trouble prior to the time of his burns, and assuming that he was put upon a diet from the time of his burns and kept upon a diet for three months after that;)

Mr. Curley:

Q. Assuming, Doctor, that Mr. Hammer was in the hospital for a month under treatment, and during that time his food consisted of, almost entirely of soups and broth, eggs, and oatmeal, with very little solids, and assuming that about a month after his injury he partook of some solid food, a small quantity of meat, and that he immediately began suffering from his stomach, and that he has continued to suffer from the condition that you found to exist on examination within the past few days, what, in your opinion, would you consider as the cause of that condition?

A. I think it would be fair to assume that the——

The Court: Speak out loudly, Doctor.

A. I beg your pardon, sir, I think it would be fair to assume that the condition was possibly due to the burns, and that is, the toxic condition of the burns.

Q. That would be your opinion?

A. Yes, sir.

Q. State whether or not, Doctor, it is common for stomach ulcers to follow a severe burn of the character undergone by Mr. Hammer at the time of his injury.

A. I think it is rather common.

Q. It is rather common?

A. Yes, sir.

Q. State, Doctor, the effect of a stomach ulcer, such as it is your opinion Mr. Hammer is afflicted with, upon his stomach and upon his general physical condition.

A. The effect upon the general physical condition would be to limit his diet, and possibly subsequently, and as a result of the gastric ulcer there might possibly be some very serious condition result from that.

Q. What?

A. Well, about seventy-one per cent of ulcers result in cancer of the stomach.

104 Q. About seventy-one per cent of stomach ulcers result in cancer of the stomach?

A. Yes sir.

Q. What per cent of those cases, Doctor, result fatally?

A. I should think possibly about twenty-five per cent of gastric ulcers, if untreated surgically, in the condition that I assume Mr. Hammer's to be would be fatal.

Q. About twenty-five per cent?

A. Yes sir.

Q. And seventy-one per cent of those cases ultimately result in a cancerous condition of the stomach? You examined Mr. Hammer's left hand, doctor, the left arm?

A. Yes sir.

Q. In what manner is that—will that afflict him in the future for performing manual labor? For instance, in his occupation as a boiler-maker?

A. Well, I don't think he would be able to perform any, any hard manual labor with that hand.

Q. Do you regard that injury, Doctor, as a permanent injury?

A. I do.

Q. What benefit, if any, Doctor, would be derived from breaking those fingers down, in so far as regaining the use of the hand would be concerned?

A. I don't think that very much benefit could be derived now from that procedure.

Q. You don't think very much benefit? Why? Tell the jury why.

A. Why simply breaking the hands back, the scar tissue is still there, and they would retract again.

Q. Is it your opinion that if the fingers were broken down, if they remained straight, that they would still remain stiff?

A. Yes, I think they would.

Q. The injury, Doctor, to his left leg and knee, will that—is that in your opinion of a permanent nature?

A. I think so, yes sir.

Q. State to the jury just of what that consists, and just why you regard that permanent.

A. Why, the scars are there and will always be there, and it would be rather hard to benefit them any.

Q. Do those injuries, Doctor, subject Mr. Hammer, to diseases to a greater extent than he would have been subject prior to his injury?

A. The injuries on his leg, you mean?

Q. The burns.

A. Why, I think they would.

Q. Now, what is your reason for that?

A. Well, the general condition has been disturbed; that is, the general well condition.

Q. You regard his condition as it is now as a permanent condition?

A. Yes sir.

Mr. Curley: That is all Doctor.

The Court: You may cross examine this witness Friday morning. Gentlemen of the jury, you will not discuss this case among yourselves, or permit anyone else to discuss it in your presence or hearing. Do not form or express any opinion as to the merits of the case until it has been finally submitted to you, and you will not read any newspaper accounts of this case. I shall rely upon you implicity not to violate these instructions. Should you do so, you might cause a retrial of this case, which, of course, is an expense to the liti-
105 gants as well as to the government. I do not know that there will be any newspaper accounts of the trial in either of the papers, but if there be such I shall rely upon you not to read them. Keep your minds open and free, and get all the impressions of this case from the witnesses, that you get at all from the witnesses who are examined before you. We will adjourn until Friday morning at half-past nine.

FRIDAY, Nov. 26th, 1915—9:30 a. m.

The Court: You may proceed. Doctor Clyne, take the stand.

MEADE CLYNE, M. D., called as a witness on behalf of the plaintiff herein, having been previously sworn and testified, resumed the stand and further testified as follows:

Direct examination (continued).

By Mr. Curley:

Q. Just one question I want to ask you, Doctor. What, besides the external examination you made of Mr. Hammer with reference to his stomach troubles—what other examination did you make?

A. I examined the stomach contents.

Q. Well, now explain to the jury in what manner that was done.

A. Why, a test meal was give- Mr. Hammer, and it was removed and examined. It was left in a certain length of time, and an examination of the contents of the fluid removed was made.

Q. What, if anything, did that disclose?

A. That disclosed the—well, a trace of blood and the viscidity of the stomach contents.

Q. Doctor, what effect will the injuries upon Mr. Hammer's body have with reference to his response to cold and heat and being tender and susceptible to irritation?

A. Why, I think they would make his more susceptible to that sort of thing.

Q. Make heat and cold more noticeable to him?
A. Yes sir.

Mr. Curley: You may cross-examine.

Cross-examination.

By Mr. Elliott:

Q. Wednesday afternoon, Doctor, you testified to an examination of the plaintiff, Mr. Hammer, in this case, and stated that you observed there scars on the right hip and on the left leg near the knee.
A. Yes sir.
Q. And on the side of the face and the back of the neck, as I remember. Now Doctor, do you consider that the scar on the right hip will keep Hammer from working the balance of his life?
106 A. No sir, that alone.
Q. Will you say that the scar on his left leg near the knee is going to keep him from working the rest of this life?
A. That scar interferes with the motion of his knee.
Q. Well, that would incapacitate him from every form of gainful occupation that you know of, would it?
A. Possibly not every form.
Q. He would still be able to work some?
A. He would be able to do work in which he would not be required to do any walking, or anything of that sort.
Q. No, he is not an invalid that requires a wheeled chair on account of that, is he?
A. No.
Q. Do you consider that the burns on the side of the face and the back of the neck will incapacitate him from working the rest of his life?
A. No sir.
Q. Did you manipulate Hammer's hand to determine how much his fingers could be straightened on the left hand?
A. Yes sir.
Q. Will you demonstrate to the jury, using your hand as an illustration, what movement is possible in those fingers in Hammer's hand.
A. As I remember it, this finger (indicating) can be almost straightened, possible straightened.
The Court: That is the index finger on the left hand.
A. Yes, possibly not exactly straightened. This one, only about part-way, in this way.
The Court: Well, now, when you say "this one" Doctor Clyne, you know the Reporter is taking this down. You say "this one"——
A. The second finger.
The Court: Very well.
A. Just partially, and this one less than that. That is the third finger. And the little one, I think it would be absolutely impossible to straighten at all.

Mr. Elliott:

Q. But it is possible to open that left hand more than that (indicating).

Mr. Curley: I don't see how the Reporter is going to get that.

A. It would be impossible to open it that much.

Mr. Elliott:

Q. Well, it is possible then, to open the left hand further than having the second and third fingers pressed into the palm of that hand?

A. Yes, it is a little more flexible than that.

Q. Doctor, I will ask you to take Mr. Hammer and show the jury how far you can open the fingers on his hand.

A. This finger can be opened I think. That is the index finger—that way (illustrating). This one less; that is the third one; and this one not at all.

Q. That one not at all, of course?

A. These two.

Q. Now, Doctor, you have been looking at a hand that has had a year to contract. In a hand like this will the fingers contract more and more as time goes on if not prevented by treatment?

107 A. Yes sir, that is usually the tendency.

Q. If fingers such as these were once straightened and placed on a splint, early, before all of this contraction had taken place, wouldn't that form of treatment keep the fingers from drawing in so much?

A. It would keep them from drawing in so much, yes sir; as much as they are now.

Q. If the patient had willingly and readily submitted himself to such treatment?

Mr. Curley: We object to the form of the question.

The Court: I sustain the objection to the "willingly."

Mr. Elliott: I will withdraw those adjectives. If the patient had submitted himself to such treatment.

(Question read.)

A. Yes sir.

Q. Doctor, in looking at such a hand burned nearly a year ago, is not the first thing that occurs to you, whether or not some of this contraction could have been prevented in those fingers?

A. Yes sir.

Q. As that hand stands, as you have examined it, would you advise amputating all of the fingers and the thumb?

A. No sir.

Q. Why not?

A. Because some of those fingers, possibly one or two are useful to him.

Q. They are useful?

A. That is, in a way, yes, useful to him.

Q. Would it be well, in your opinion, to amputate the little finger?
A. Yes, I think so. Possibly—yes, I think it would be.
Q. Would you consider that the amputation of a little finger on the hand is a very grave mutilation?
A. No sir, not under the circumstances.
Q. And in your opinion is such an operation attended by great pain or danger to the patient?
A. No sir.
Q. May it not be performed even under cocaine safely?
A. Yes sir.
Q. And is that not a common practice?
A. It is.
Q. In surgery?
A. It is.
Q. You stated Wednesday afternoon that you found a gastric ulcer, stomach ulcer in Mr. Hammer, and you also stated that it was fair to assume that that condition probably followed the burning. Now, you made this diagnosis on what Hammer told you about his stomach, and also on examination of the stool and the stomach contents; I believe you also stated that this morning.
A. Yes sir.
Q. Did you find any blood in the stool?
A. No sir.
Q. You found acidity in the stomach contents, however?
A. Yes sir.
Q. Is not acidity a common thing in individuals who have not ulcer?
A. It is.
Q. You also stated that you found blood, I believe, in the stomach contents.
A. Yes sir, I said a trace of blood.
Q. Now, how do you take these stomach contents from the body?
A. With a stomach tube, stomach pump, ordinarily called.
108 Q. Will you explain to the jury, please, how that stomach pump is used?
A. The stomach pump is passed through the mouth into the throat and down the œsophagus into the stomach.
Q. Into the stomach?
A. Yes sir.
Q. Now, Doctor, does it not very often happen, without any reflection intended whatever on the operating physician, or surgeon, that blood will come from the use of that stomach pump.
A. Sometimes.
Q. That does happen, does it not Doctor?
A. Yes, it does happen.
Q. Might it not have been possible that the blood that you found so became present?
A. There is a possibility of that.
Q. Did you give Hammer, Joe Hammer, here, a radiograph or an X-ray?
A. No, sir, I did not.

Q. You haven't seen that ulcer then, have you?
A. I haven't seen it.
Q. Doctor, has the theory that a stomach ulcer, gastric ulcer necessarily or does follow a burn, has that any logical explanation in your mind? In your own experience has that any logical explanation?
A. Except that it does follow, that is the only explanation that I can give you.
Q. Well has it any logical explanation in your mind?
A. Yes, there is a logical explanation.
Q. Well, now, isn't this more of an old text-book statement that has been handed down, and the logic left out, that ulcer is caused by burns?
A. It is an old text-book statement, I think.
Q. Don't you know that the more recent surgical and medical investigation has exploded the fact that a man ever gets an ulcer from a burn?
A. No sir.
Q. You don't know that?
A. No, I don't know that.
Q. Isn't that the later theory?
A. I know that such a theory has been advanced. I did not know it had been generally accepted.
Q. And the theory has grown out of the fact that a burn and an ulcer have existed as a coincidence.
A. Certainly they can exist as a coincidence.
Q. Could inhaling fumes give a man ulcer of the stomach?
A. Not—no, I don't think so, not ordinarily.
Q. You don't think so, do you?
A. Not ordinarily.
Q. Well, after all, are not stomach ulcers rather common things, anyway, and many people have them who have had no severe burn or burns at all, and who don't know that they have an ulcer?
A. Ulcer- are common—commonly occur, and do not follow burns. Possibly some people have ulcers, slight ones, that do not know that they have them, except that they are conscious of some dyspeptic condition, or indigestion, as they say.
Q. They could arise from a great variety of causes?
A. Yes, sir.
Q. Do you mean*t* that, Doctor, your statement of last Wednesday, that one man out of every three, or seventy one per cent of persons who have ulcer of the stomach get cancer?
A. That is the accepted statement, accepted view.
Q. Rather do you not mean that of the people who have cancer of the stomach, seventy-one per cent of those people get that cancer from the ulcer of the stomach.
109 A. That also could follow.
Q. I did not understand your answer.
A. That could follow, I say.
Q. Well, they are not exactly the same statement-, are they?
A. No sir.

Q. That is, seventy-one per cent of all ulcers produce cancer is not the same as the statement that of people who have cancer, seventy-one per cent of those persons derive their cancer from an ulcer. Those aren't the same statements by any means.

A. No.

Q. Well, then, you mean of those persons who have ulcers seventy-one per cent of such persons derive—I mean of those persons who have cancer, seventy-one per cent of such persons derive their cancer from ulcer?

A. I did not make that statement.

Q. No, but isn't that what you mean, or do you mean to say that seventy-one per cent of ulcers cause cancer?

A. Yes, seventy-one per cent of all ulcers; that is, who have a definite history of ulcer, have been found to develop cancer in a number of clinics where they keep accurate data on the subject.

Q. If a man came to your hospital, Doctor, having a burn and a running fever, would you put him on a diet composed of pie and meat or would it be a matter of hospital routine to put him on a soft and liquid diet?

A. A soft diet would be the routine.

Q. A man having a severe burn naturally would have a running fever, would he not?

A. Yes, if he had infected burns.

Q. And having that fever, that would be the reason for putting him on a soft liquid diet?

A. Yes sir.

Q. And not keeping him on pie and meat. That was the left hand that was burned, was it not?

A. I did not hear that.

Q. That was the left hand that was burned, was it not?

A. Yes, sir.

Q. Now, Mr. Hammer here has stated that he has acted a good part of his life as a boiler-maker, and iron-worker foreman. In your opinion do you believe that his injuries would incapacitate him from acting as such foreman?

Mr. Curley: I object to the question. It does not say that the doctor knows what the duties of an iron-worker or boiler-maker foreman are.

The Court: Taking into consideration the fact that he answered your question along that line, I will overrule the objection. He may answer.

The Witness: Whether or not he can act as a foreman, is that the question?

The Court: Read the question.

(Question read.)

Mr. Curley: I object to that for the further reason that Mr. Hammer did not testify that a good part of his life had been spent in that way.

110 The Court: It would depend upon what you mean by a good part of it. I think it is rather indefinite, and for that

reason I sustain the objection. My recollection is that the witness said seven and one-half years as a boiler-maker.

Mr. Curley: Seven and one-half years as a boiler-maker?

The Court: That is what he said.

Mr. Curley: And at different times he acted for shorter periods as foreman in one way or another. But he did not state that he had so acted for a good part of his life.

The Court: I sustain the objection to the question for the reasons just stated.

Mr. Elliott:

Q. Doctor, Mr. Hammer has testified that in the past he has acted as a boiler-maker and iron-worker foreman. In your opinion would his present injuries incapacitate him from acting further as such foreman.

A. If the duties of a foreman require any demonstrating, I would say not. If a foreman just walks around and does not do any particular manual labor, I would say that he could.

Q. You have just made a diagnosis of ulcer from seeing Hammer once or twice here in the last few days, haven't you.

A. I saw him three times.

Q. You haven't followed his case except what he has told you for any length of time, have you?

A. No sir.

Q. Does not the fact that you found no blood in the bowel movement speak against such an active ulcer as you have spoken of?

A. Not necessarily.

Q. With an active ulcer of the stomach would you expect to find blood in the bowel movement?

A. I only examined one stool.

Q. You did not find any in that?

A. No.

Q. Now if this little finger had been removed early and Mr. Hammer had received treatment so that his fingers would not have drawn up, might it not have been possible to have given him a pretty fair working hand?

A. Yes.

Q. Or if he had permitted the removal of the little finger and the application of splints, probably under gas, you think under those circumstances he might have had a fairly useful hand?

A. Yes, he might have had a fairly useful hand.

Q. Now what does breaking down such a hand as this mean? Mr. Hammer stated here the other day, yesterday, that his physicians wished to break down his hand. Now what does that mean with such a hand as this? Does it mean breaking the bones?

A. Not necessarily, no; it does not mean breaking the bones. It means breaking up the adhesions that have formed in the joints, and possibly straightening the tendons in the hand.

Q. Now how is that done? What is that operation?

A. Ordinarily the patient is given some sort of an anæsthetic, and the fingers are forcibly straightened.

Q. On a splint?
A. It is put in a splint afterwards.
Q. I mean put up in a splint afterwards.
A. Yes.
111 Q. Would the application of gas be a sufficient anæsthetic in a case of that character?
A. Yes sir.
Q. Does it seem to you in your experience as a surgeon and physician like a reasonable surgical statement that any competent doctor would have advised Hammer to cut off the fingers and thumb on his hand?
A. No, I would not.
Q. In the beginning?
A. The fingers and thumb?
Q. Yes, leaving a stump?
A. No, I would not think so.
Q. Would you not regard it as a more reasonable surgical statement that the doctor advised him to have his fingers straightened under gas, and determine the extent to which they could be straightened, and then if nothing could be done for that little finger, to have removed it?
A. Yes sir.
Q. Do you know Doctor Smith, sitting here, at all?
A. No.
Q. Have you heard of him?
A. Yes sir.
Q. From your knowledge of Doctor Smith do you think he would advise Joe Hammer to cut off all the fingers on his hand?

Mr. Curley: I object to it as not proper cross-examination.
The Court: Objection sustained.
Mr. Elliott: That is all, Doctor.

Redirect examination.

By Mr. Curley:

Q. Doctor, by breaking down the fingers in the manner you have just stated, would you understand by that that after the fingers had been so broken down that he would have the use of his fingers?
A. No.

Mr. Curley: That is all.

Recross-examination.

By Mr. Elliott:

Q. But you say, Doctor, that if that had been done you believe he would have had a fairly useful hand? That is your answer to my question?
A. Fairly useful hand.

The Court:

Q. What use would they have been to him, those fingers?

A. Well, possibly a little bit straighter than they are now.
Q. Could the fingers have been worked and used any better?
A. They might have been used a little better than they are now, a little more than they are now, more flexible.

The Court: That is all.

Mr. Elliott:

Q. If that had been undertaken early, Doctor, within two or three months after the injury, when the burns had first healed, would they not have been a great deal better, before the scar had hardened and thickened?
A. It is rather impossible to say how much better they would be—they would have been, but I think they might be a little bit better under that treatment.

Q. But such treatment as that was treatment which he
112 should have submitted to — have gotten the best possible result from his hand?
A. Yes sir.

(Witness excused.)

I. E. HUFFMAN, M. D., called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Curley:

Q. Your name, Doctor.
A. I. E. Huffman.
Q. You are a practicing physician here?
A. Yes.

Mr. Curley: I suppose you will concede that the Doctor is qualified to testify?
Mr. Elliott: Yes sir.
Mr. Curley: It is stipulated that the Doctor is qualified to testify as an expert in this case.

Q. Doctor, do you know the plaintiff, Mr. Joseph Hammer?
A. Yes, sir.
Q. Have you been called upon to make an examination or examinations of Mr. Hammer within the last few days?
A. I have.
Q. With reference to his burns and his general condition?
A. Yes sir.
Q. Well, from that examination what did you find?

Mr. McFarland: If your Honor please, we object to any examination of Doctor Huffman here on any facts in this case on the ground that he was present during Doctor Clyne's entire examination Wednesday afternoon and this morning. They may examine Doctor Huffman as much as they wish based on a hypothesis, but I

believe upon the facts in the case that he has learned by an active knowledge of the case, he should be disqualified to testify to.

The Court: My recollection is that I stated to counsel on both sides that the expert witnesses would not be put under the rule.

Mr. McFarland: I understood, your Honor, that that would apply to hypothetical examinations.

The Court: I do not recall limiting it that way.

Mr. McFarland: That was my understanding of it.

Mr. Curley: Your Honor stated if they wanted to testify to anything outside of the case, outside of that, that would apply.

The Court: Any statement made by the plaintiff or any
113 facts in the case. Now if you are keeping any of your expert witnesses out of the room by reason of that impression, they may enter the room.

(Question read.)

A. I found a number of burns, of scars about the body. One I believe on the right hip, on the left leg there were a number of scars, and — the head and neck were a number of scars, and the left hand.

Mr. Curley:

Q. What *what* the condition of those scars on his left leg, Doctor.

A. Well, there was considerable scar tissue there, and they were still discolored, not contracted down, indicating that they had been burned rather severely.

Q. Did you make any examination of—well, did you find any other conditions, Doctor, in your examination?

A. I found a condition of the stomach that led me to believe that he had an ulcer, gastric ulcer.

Q. You found a condition that led you to believe?

A. Yes sir.

Q. From you- examination of Mr. Hammer and the history of his case, did you form any opinion as to the cause of that condition?

A. I did.

A. What?

A. I believe that the ulcer was caused by the burns that he had received at the time that he was injured.

Q. As a consequence of his present physical condition, Doctor, what would you say as to the permanency or otherwise of his injuries?

The Court: All of them or certain ones?

Mr. Curley:

Q. Well, the permanency of the injury that he received; that is, upon his general condition?

Mr. Elliott: I think we will object to that question.

Mr. Curley: It is pretty hard to say just which scar or which——

Mr. Elliott: Specify the injuries in the question.

Mr. Curley: I will withdraw that question.

Q. What would you say as to whether or not Mr. Hammer has been permanently or otherwise injured from the nature of the burns that he has received?

A. I think his injuries are permanent.

Q. Are ulcers of the stomach always accompanied by a hemorrhage, Doctor?

A. No.

Q. Approximately what percent are?

A. Well, there is about—blood is found on examination of the stools and stomach contents in about fifty percent.

Q. About half?

A. Yes sir.

Q. Is that among the medical profession considered a serious condition, Doctor—abscess of the stomach?

A. Ulcer?

Q. Ulcer of the stomach?

A. It is.

Q. What are come of the consequences of such a condition?

A. Well, general impairment of health, and a cancer of the stomach often results from an ulcer.

114 Q. Do cancers follow to any great extent from any marked number of ulcers?

The Court: Read that question?

(Question read.)

Mr. Curley:

Q. From any marked number or any great number?

A. Yes, they do.

Mr. Curley: You may examine.

Cross-examination.

By Mr. Elliott:

Q. Are you of the opinion, Doctor, that that scar on Mr. Hammer's left leg is going to incapacitate him for the rest of his life from doing any work?

A. No.

Q. He walks around pretty briskly, does he not?

A. I did not catch that.

Q. I say he walks around fairly briskly, does he not?

A. Well, I think that after those scars on his legs are entirely contracted, that the scars will probably not cause any disability of the legs.

Q. The legs will be all right?

A. I think so in time.

The Court: How long a time will that require in your judgment?

A. That would be pretty hard to state, Judge. Possibly it may be a couple of years. That is only approximately. It would be hard to state.

Mr. Elliott: Doctor, if Mr. Hammer within a reasonable time after his injury, upon the healing of the burns, had submitted himself to a treatment whereby the adhesions would have been broken

down, possibly under gas, and perhaps the fingers put in a splint and his little finger removed, in your opinion would he not have a fairly useful hand—a hand much better than the one that he has at present?

A. I would like to ask if the question prior to this referred to the hand.

Q. No, it did not.

The Witness: Read the question.

(Question read.)

A. Well, the hand would possibly have been some better than it is at present.

Q. And considering that this is his left hand, he would have had a fairly useful hand for his left hand, if that had been done?

A. Well, there would have been considerable disability remain, I believe.

Q. But do you not agree with Doctor Clyne that if that had been done, Hammer would probably have had a fairly useful hand?

115 A. Well, that would depend upon what you mean by a fairly useful hand. It would not have been a normal hand nor nearly as useful as a normal hand.

Q. It would have been what to an ordinary man would be a fairly useful hand, if he could have gotton use out of it, if he had put it to some gainful occupation.

A. Yes, he would have gotten some use out of it.

Mr. Elliott: That is all.

Redirect examination.

By Mr. Curley:

Q. He can still get some use out of it?

A. Yes, he can.

Q. Doctor, when you stated a few moments ago that you considered in time that the scars on Mr. Hammer's legs would reach such a state of healing that they would not cause him any considerable inconvenience, did you have in mind the injury to his left knee?

A. Well, I think that injury probably deeper than the skin, and that the ligaments there are injured.

Q. If that be true, will that ever become in such a condition that he will be relieved from inconvenience from it?

A. No, I don't think that that could ever recover entirely.

Mr. Curley: That is all.

(Witness excused.)

JANE E. HAMMER, called as a witness on behalf of the plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kearney:

Q. You may state your name, please.
A. Jane E. Hammer.
Q. Are you the wife of the plaintiff, Joseph B. Hammer?
A. Yes, sir.
Q. Whereabouts do you live?
A. Morenci, Arizona.
Q. Do you remember when Mr. Hammer got burned in the Smelter?
A. I do.
Q. Did you see him that day?
A. I did.
Q. Where did you see him?
A. At the hospital.
Q. You saw him when they took him to the hospital?
A. Well, about a half an hour afterwards I went over.
Q. What was his condition when you saw him?
A. Well, when I saw him, he had his hands and face and his limbs all bound up, and he was in terrible pain when I saw him. He hardly knew me.
Q. Did he appear to know what was going on at the time?

Mr. McFarland: Now, if your Honor please, I am perfectly willing for the counsel to ask the witness what he did
116 The Court: Do you object to that question?
Mr. McFarland: Yes, sir, I do.
The Court: Objection sustained.

Mr. Kearney:

Q. And what was his condition at that time, you say?
A. Well, he was in terrible pain.
Q. How long was he in the hospital?
A. Why, I think about four weeks.
Q. Did you take care of him in the hospital?
A. I did, I was there every day and the night, off and on.
Q. What?
A. I was there every day and every night, off and on, as the family would relieve me.
Q. Did he require someone to sit up nights with him?
A. Yes.

Mr. McFarland: If your Honor please, that is an opinion, I am perfectly willing that the witness shall state what she knows and what she saw, but as to expressing an opinion, I object to it, unless she qualifies as an expert witness.
The Court: She may state whether or not he was attended at

night, but whether or not, in her opinion, he required, it seems to me, is calling for an opinion.

Mr. Kearney:

Q. In your judgment, did he require attention at nights, as well as days?

The Court: I say I sustain the objection to that.
Mr. Kearney: How?
The Court: I said I would permit you to prove whether or not he was attended day and night by a nurse, but her opinion as to whether it was necessary is objectionable.

Mr. Kearney:

Q. State whether or not he was attended day and night by the nurses.
A. No, he could not use his hands, and for that reason someone had to be with him. He could not help himself in any way.

The Court:

Q. Then, he was attended day and night?
A. Day and night, yes.

Mr. Kearney:

Q. And did you take care of him there?
A. I did.
Q. For what length of time? You stated about five weeks. Well, now, during that time, say the four or five weeks in the hospital, was he in considerable pain?
A. Yes, he was.
Q. And after that, he was well enough to leave the hospital,
117 or sufficient so that he could go to your home, or not?

Mr. McFarland: I object to that question as absolutely leading and suggestive.
The Court: I think that is too leading. Let her state the facts, if counsel does not object.

Mr. Kearney:

Q. After he was in the hospital, where did he go after that?
A. He came home.
Q. At home?
A. Yes.
Q. And was he under treatment then at home?
A. Yes, sir.
Q. For what length of time?
A. Oh, I don't just remember, but away along in the summer, he was under the Doctor's care.

The Court: Mrs. Hammer, the farthest man in the Jury must hear your statements. Will you please speak a little louder. They will hear you much better.

Mr. Kearney:

Q. You say along in the summer; you mean July or August?
A. I think in July, I think up until July.
Q. His injury was in December?
A. The 28th of December.
Q. Then, up to July, did he continue to suffer pain?
A. Oh, yes, he has pain right along.
Q. During that time, from the time of his injury up until July, was he under the treatment of the Doctors?
A. Yes, he went to the Hospital every day.
Q. He went to the Hospital every day for treatment?
A. Every day for treatment, yes.
Q. Now, how did he get to the Hospital? Did he go unaided or not?
A. Well, the first few weeks that he was home, my daughter had to take him over, had to lead him over, and lead him back. He was too weak to walk alone.
Q. State whether or not, since his injury up to the present time, he rests well or no, of nights?
A. No, he does not. There isn't any night that he goes to sleep until almost morning. Sometimes it is daybreak before he goes to sleep, with the pain in his hand and in his limbs.
Q. Anything of that kind occur before his injury?
A. No, he was perfectly well.
Q. What was the condition of his health before these injuries?
A. Oh, he had good health, fine health.
Q. He had good health?
A. Yes, he had splendid health.
Q. You, of course, know the condition of his left hand being closed there. Did you ever have a conversation with Dr. Smith about the condition of his hand?

A. Yes, I did. In March, why, my daughter was in the
118 hospital sick, and the day that I took her home, I was out in the hall waiting for her, talking with Doctor Smith, and I says, "Doctor, do you think Mr. Hammer will ever be able to do anything again?" "Well," he said, "It is very doubtful, Mrs. Hammer." And the nurse also told me the same thing. Mrs. Myers, she told me.

Mr. McFarland: Never mind, I object to what Mrs. Myers said.
The Court: Objection sustained, and the last part of the answer may be stricken out, because it is not responsive to the question.

Mr. Kearney:

Q. Doctor Smith said it would probably be doubtful?
A. Yes, he did.

The Court: Now, was Doctor Smith the doctor who attended him?
Mr. Kearney: Doctor Smith was his physician.
The Witness: Doctor Smith.
Mr. Kearney: The one that was attending him, so I understand.

Mr. McFarland: We admit that Dr. Smith was the surgeon that treated him.

The Court: Have you any objection to the confidential communication?

Mr. McFarland: Well, if they want to break down the barriers, we will let Doctor Smith testify.

Mr. Kearney: That is all.

Cross-examination.

By Mr. McFarland:

Q. You say you are the wife of Mr. Hammer?

A. Yes.

Q. Did you see Mr. Hammer—how long after he had been taken to the hospital after the injury?

A. About half an hour.

Q. Half an hour?

A. Yes.

Q. And you were with him more or less from that time?

A. Yes.

Q. Until he left the hospital?

A. Until he left the hospital.

Q. Of course, you have been with him since he came out.

A. Yes.

Q. That is practically all you know about it, isn't it?

A. Except what I have talked——

Q. Excepting the conversation that you have testified to between yourself and Doctor Smith; that is practically all?

A. Yes, that is all.

Q. You don't know anything about how the injury occurred?

A. No, I don't.

119 Q. From your personal knowledge?

A. No.

Q. You weren't anywhere near the smelter at the time?

A. No.

Q. And you didn't know anything about it until after Mr. Hammer had been brought up to the hospital?

A. No.

Q. And all the information you have you have gained from him?

A. Yes.

Q. Didn't Doctor Smith in the conversation that you have detailed between himself and yourself, tell you that if Mr. Hammer would permit his hand to be treated by what is understood as breaking down, pressing it back and manipulating it, that it could be made a fairly useful hand?

A. No, he did not.

Q. He did not tell you that?

A. No.

Q. Mr. Hammer never told you that Doctor Smith had made such a request of him, did he?

A. Well, he may have asked him later on. This was in March.

Q. This was in March?

A. This was in March that I was speaking to him.

Q. You weren't present then when Doctor Smith told Mr. Hammer that if he would submit that hand——

A. No.

Q. —to manipulation in a certain way that he would have a fairly useful hand made out of it; and that Mr. Hammer refused to have the treatment done?

A. No, Mr. Hammer came to me and told me that Doctor Smith had suggested that.

Q. Had suggested it?

A. Yes.

Q. And he refused to have it done?

A. No, we talked about it.

Q. And he refused to let Doctor Smith do it; that is the idea?

A. Well, our living depended upon that, and I knew what Doctor Smith had told me, that he did not think it would ever amount to anything; and of course, we thought there was no use of any more suffering.

Q. Now Mr. Hammer, as I understand you, did say that Doctor Smith had suggested that treatment of his hand?

A. He had suggested that, yes.

Q. And Mr. Hammer had refused to have it done?

A. Well, he did not tell me he had refused that day. He came over and we talked it over, and I remember what Doctor Smith told me that he did not think his hand would ever amount to anything, and we thought there was no use of any more suffering. If it wasn't going to amount to anything, it might just as well stay the way it was.

Q. And that is the reason Mr. Hammer did not have it done? On account of what Doctor Smith had told you previously; that is, that it was doubtful about his ever recovering the usefulness of that hand to any extent; that was the idea? I understood you to say that Doctor Smith had told you, Mrs. Hammer, in a conversation that he thought it was doubtful whether Mr. Hammer would ever regain the usefulness of that hand?

A. Yes, he did.

Q. Now, later on, as I understand you, Mrs. Hammer, he suggested to Mr. Hammer that he have that hand treated.

A. Well, he had been treating it for a long time.

Q. Well, didn't he say that if Mr. Hammer would have that hand treated by what is known as breaking down, pressing back the fingers by manipulation or otherwise, that he would recover a fairly
120 useful hand?

A. Yes.

Q. Yes, that is true, isn't it?

A. That is true, but——

Q. Mr. Hammer told you——

The Court: She started to make some further explanation of that statement. Now, explain.

The Witness: But we knew by another party that had had his hand broken down there and it didn't do any good; his hand is just the same as it was.

Mr. McFarland: I see.

The Witness: Yes.

Mr. McFarland:

Q. And that is the reason that Mr. Hammer objected to having his treated that way?

A. Well, I suppose from what Doctor Smith told me, and this other party who had had his broken down, and it didn't do any good; so we did not think there was any use of Mr. Hammer's suffering any more.

Q. Yes, I see, Mrs. Hammer. The two reasons why he objected to it were that Doctor Smith had told you before that it would be impossible to restore that hand to what we understand as a useful hand; that is one; and the other one is that you had known of another party whose hand was in a similar condition; being broken back, and that party never recovered the use of his hand?

A. Yes.

Q. And that is the reason Mr. Hammer declined to have his hand treated?

A. Yes sir.

Q. And that is what Mr. Hammer told you?

A. Yes, we talked it over.

Mr. McFarland: That is all.

Redirect examination.

By Mr. Kearney:

Q. The person that had his hand broken down and pulled back that you mention, that was Mr. Latham, was it not?

A. I think that was his name.

Q. Doctor Smith did that job, too, didn't he?

A. He did.

Q. He never recovered the use of his hand either?

A. No.

Q. Doctor Smith did that job?

A. He did that, yes.

Q. Was that a burn?

A. Why, I don't remember, Mr. Kearney, what it was, but I know his hand was terribly crippled. I don't remember what it was, however.

Mr. Kearney: That is all.

Recross-examination.

By Mr. McFarland:

Q. Mrs. Hammer, what was the name of that party, if you remember?

A. What is that?
Q. What is the name of the party that you refer to?
A. Mr. Latham.
Q. His hand did not yield to treatment?
A. No, his hand was crippled.
121 The Court: Who was the party?
A. Ledden, I think his name is.
Mr. Elliott: Latham?
The Witness: Yes, that is it.
Q. Latham?
A. Yes.

Mr. McFarland:

Q. Now, you say that the injury caused to Mr. Latham's hand was not the result of a burn?
A. I don't know.
Q. Well, now, as a matter of fact, Mrs. Hammer, don't you know that Mr. Latham got his hand mashed out there at the smelter, absolutely crushed to a pulp?
A. Well, I know his hand was similar to Mr. Hammer's. It was drawn.
Q. It was not similar?
A. Drawn up, something like Mr. Hammer's was.
Q. I understand, but it was not caused—the injuries were not the result of the same cause?
A. I couldn't say.
Q. You don't know about that?
A. No.

Mr. McFarland: That is all.
Mr. Kearney: The plaintiff rests, your Honor.
Mr. McFarland: If your Honor please, I would like to have the privilege of asking two witnesses introduced on the part of the plaintiff, on one or two questions on re-cross examination. If I would be permitted to do that later, I won't detain the court now.
The Court: No, you had better do it now so as to give the plaintiff the benefit of it.
Mr. McFarland: I would like to ask Mr. Bentley a question and also Mr. Hammer.
The Court: Is there any objection to the witnesses being recalled?
Mr. Curley: No, we have no objection.

JOSEPH B. HAMMER, the plaintiff herein, recalled to the stand for further cross-examination by Mr. McFarland, testified as follows:

Q. You testified, as I understand, yesterday—on Wednesday evening, that you had occupied, or that you had been a foreman, boiler-maker foreman. Now, I want to ask you what are the duties of a boiler-maker foreman?
A. I hadn't stated that I was a foreman in—as a boiler-maker foreman.

Q. Well, did you state that you had occupied the position of foreman in any other respect?

A. Yes sir.

Q. What was that?

A. In Steel foundries.

A. Well, now, what are the duties of a foreman in a steel
122 foundry?

A. To carry out the work, see that it is properly done—give orders and see that the work is done, hire men, dispose of them those that are not efficient.

Q. Would that position necessarily cause you to use your left hand in that position?

A. Oh, yes, at times.

Q. Well, the fact that you hired people and directed them and discharged them, would not involve the use of your left hand, would it?

A. Oh, yes, at times in order to carry the work out, the foreman assists his men, and sometimes—and sometimes he is short-handed, and he has to help.

Q. But the fact that the duties of the office involved hiring and the discharge of the men, and their direction, would that involve the use of your left hand?

A. No, not to discharge them; no sir. I could discharge them with one hand, I suppose.

Q. You couldn't direct them with one hand?

A. Yes.

Q. And employ them with one hand. So that the fact that you are disabled in your left hand would not necessarily involve the duties of foreman?

A. Yes, it would, according in what capacity the foreman has. In some shops a foreman has to do considerable of the work. He may have a bunch of twenty or thirty men, and still be leading the certain job they are on, and he has to work and perform labor.

Q. That injury would not keep you from performing the duties of foreman as much as it would if you were a laborer under the foreman?

A. Oh, no, probably not quite so much. It would handicap me in taking certain positions.

Q. Well, now, the fact that you have that burn on that hand, would that disqualify you from acting in the capacity of a foreman?

A. Well, that depends now. If I would apply to a shop where I wasn't known it would disqualify me.

Q. It might and it might not?

A. Oh, yes, there is no might about it nowadays.

Q. Absolutely so?

A. Absolutely.

Mr. McFarland: That is all.

Redirect examination.

By Mr. Kearney:

Q. It is pretty hard to get a position now, ain't it, as a foreman?
A. Yes, it is a hard matter to get a position.

Mr. McFarland: If the Court please, I object as not proper cross-examination.

The Court: Well, it was answered before objection.

Mr. McFarland: What is that.

The Court: I say it was answered before an objection was interposed. Any further questions?

Mr. Kearney: No.

123 The Court: Stand aside, Mr. Hammer.

Mr. McFarland: Now, Mr. Bentley.

ELMER BENTLEY, called as a witness on behalf of the plaintiff, resumed the stand for further cross examination by Mr. McFarland, and further testified as follows:

Q. You were sworn yesterday or the day before yesterday, and testified?
A. Yes sir.
Q. And you testified that you saw this car come on the feed-floor?
A. Yes sir.
Q. And from there until it came to where Mr. Hammer was in the hopper?
A. Yes.
Q. Now, where was the exact position that you occupied when you saw the car from the time of its coming onto the feed-floor until it passed over the hopper in which Mr. Hammer was working?
A. I was standing on a ten-inch air pipe that runs along.
Q. Was that on the feed-floor?
A. No sir.
Q. Where was that?
A. That was right opposite the feed-floor.
Q. Opposite?
A. Yes sir.
Q. In another part of the smelter?
A. Well, it is not exactly another part of the smelter. It is about four or five feet off of the floor. I should judge.
Q. Four or five feet off of the floor?
A. Yes.
Q. What do you mean by off of the floor?
A. I mean it does not run along on the floor. I mean it is to one side.
Q. One side?
A. Yes sir.
Q. Which side would that be of the car coming on the feed-floor?
A. Which side of it?
Q. Yes.
A. It would be on the righthand side if you were looking east.

Q. What distance would that be from the track on which the calcine car came in?
A. It would be twenty-five or twenty-six feet.
Q. Twenty-five or twenty-six feet?
A. Yes.
Q. Now, what were you doing at that time?
A. I went out there to repair some work for Mr. Neilson on this pipe work.
Q. What work?
A. Pipe work?
Q. There was no obstruction between you and the car at any time?
A. Sir?
Q. There was no obstruction between you and the car at any time?
A. No sir.
Q. Anybody present with you at that time?
A. Anybody present with me?
Q. Yes.
A. Mr. Nielson was along.
Q. Mr. Nielson was there?
A. Yes sir.
Q. That is Joe Nielson?
A. Harry.
Q. He was the foreman, was he not?
A. Yes.
Q. Well, could he have seen the car from the same point?
A. From where he was standing; no sir.
Q. What would prevent him from seeing it?
A. Because he was down below me.
124 Q. What was he standing on?
A. Sir?
Q. What was he standing on below?
A. He was standing on the ground.
Q. On the ground?
A. Yes sir.
Q. And you were how many feet above him.
A. I should say I was six or eight feet.
Q. Above him?
A. Possibly a little more.

Mr. McFarland: I think that is all.
Mr. Kearney: That is all.
(Plaintiff rests his case.)

Mr. McFarland: We were going to precede this witness that is called, by Mr. Fraser. He has a blue-print of this situation, and it would be much more satisfactory to the jury to have a correct view of the situation on top of the feed-floor of that smelter.
The Court: Where is he?
Mr. McFarland: He is having a drawing made of another situation, and I told him I did not think we would need him before an hour, and he said he would be back in an hour. That is the situa-

tion. But rather than delay the court we will introduce one witness, I think, and probably he will be here by the time we are through with him.

ESTANISLADO PROVENCIO, called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What is your name?
A. Estanislado Provencio.
Q. Where do you live?
A. I live in Clifton.
Q. How long have you lived there?
—. Oh, I have been living there most of my life.
Q. What have you been doing while you were living at Clifton?
A. I have been working at the foundry, and that is all I have been doing.
Q. Foundry and what?
A. Foundry works.
Q. Have you ever worked for the Arizona Copper Company?
A. Yes, sir.
Q. How long?
A. I work there about five years.
Q. What work were you doing during those five years?
A. Running a moter.
Q. Motor, is that all?
A. Yes, and work at smelters and the foundry work.
Q. Anything else?
A. That is all.
Q. Where were you born?
A. I was born in El Paso.
Q. Were you working for the Arizona Copper Company in December, 1914, which will be a year ago the coming December?
A. Yes, I work there in December.
Q. What were you doing then?
A. I was running a motor, calcine motor.
Q. What was the power that propelled the motor; what was the power used?
125 A. That is——
Q. Steam or electricity?
A. Electricity.
Q. How long had you been running that motor?
A. I had been working for a year on that motor.
Q. What is that motor used for?
A. It is used for to put the charge in the reverberatory there.
Q. Where did you get the charge that you put in the furnace?
A. I get them from what they call the roasters.
Q. Now, how did you get the material that you carried from the

roasters to the reverberatory furnaces? How did you get it from the furnace, from the roaster to the furnace?

A. Well, they got some hoppers up there to fill that motor, you know, they got some.

Q. Did you carry that material from the roasters to the hoppers in a calcine car?

A. How is that.

Q. Was it a calcine car that you used to bring this material from the roasters to the smelter?

A. Yes, sir.

Q. I mean, not the smelter but the furnaces?

A. Yes, sir.

Q. Who run the motor that carried that material.

A. I do.

Q. How long had you been on that motor?

A. About a year I say.

Q. Now, were you running that motor on or about the 28th day of December, 1914?

A. Yes, sir.

Q. What do you call the stuff that you take from the roaster to the furnaces?

A. They call it calcine.

Q. Well, now, on that day did you take any calcine from the roasters to the reverberatory furnace?

A. Yes, sir.

Q. How many times did that car haul calcine from the roaster to the reverberatory furnace on that day, if you remember?

A. That would depend on how the furnace is, you know. Sometimes you bring six loads; sometimes bring eight loads in the shift, in eight hours.

Q. Eight Hour shift?

A. Yes.

Q. You don't remember of having brought that material from the roaster to the smelters on the 28th of December?

A. Yes, sir; I am sure.

Q. Do you remember when Mr. Hammer was injured, burned?

A. How is that?

Q. Do you remember when Mr. Hammer was injured by being burned?

A. Yes, sir.

Q. Well, now, on that day did you haul any calcine from the roasters to the smelters?

A. Yes, sir; I carried some that day.

Q. Do you remember about the time of day that Mr. Hammer was burned in the hopper?

A. That was—what I remember the 28th there, about two o'clock, something like that.

Q. About two o'clock?

A. Yes, half-past two; I can't be very sure.

Q. Well, now, at the time he was burned with this calcine or just

before he was burned with this calcine, did you bring a car of that material from the roasters onto the feed floor of the smelter there?

A. Yes, sir; I did.

Q. You did?

A. Yes sir; I had been hauling all the morning: you know, from the roasters to the furnace.

Q. Well, now at the particular time, what did you do with your car when you came onto the feed-floor in reference to the hopper in which Mr. Hammer was working?

126 A. Well, I used to stop with my car every time, so they make me a sign to pass, and after they make me a sign——

Q. Stop the car?

A. Yes, stop every time I go. Them fellows, where they was working, you know.

Q. About where did you stop this car in reference to the hopper that Mr. Hammer was working in?

A. Over twenty—or twenty-five feet.

Q. How many?

A. About twenty or twenty-five feet.

Q. About twenty—or twenty-five feet?

A. Yes.

Q. What did you do that for?

A. Well, I did that to give them time to get out of danger, you know.

Q. Well, now, when you stopped at that distance from this hopper at which he was working, did you see Mr. Hammer?

A. No, sir.

Q. Didn't see him?

A. No, sir. I did not see him.

Q. Was the hopper in plain view of you when you stopped?

A. How is that?

Q. Was the hopper that Mr. Hammer was in, was that in plain view of you; could you see that?

A. Yes sir; I could see that.

Q. Did you know that he was in that hopper; did you know that he was working in that hopper?

A. Yes, I know that he was working in that hopper.

Q. You had seen him work there several times before when you came in to the furnace, on that day?

A. No, I never saw him in that hopper. I saw him in some other hoppers inside there.

Q. Had he been working in that hopper that day previous to the injury?

A. Yes, he was working that day.

Q. And you had hauled a good many loads in there, you say, before that?

A. How is that.

Q. How many trips had your car taken before that?

A. Oh, before that? Oh, about four trips, I guess.

Q. Now, what did you do in those previous trips when you got up close to the hopper in which Mr. Hammer was at work?

A. What did I do?

Q. Yes, when you came along that feed-floor and would get up close to where Mr. Hammer was at work, what did you do with the car?

A. Well, I stopped.

Q. You stopped?

A. Yes sir.

Q. Well, then, what did Mr. Hammer do when you stopped?

A. Well, he used to get out of there.

Q. Did he do it on each of the previous four trips you made that morning?

A. Yes sir.

Q. Well, was anybody to notify Mr. Hammer that the car was coming?

A. Yes, sir.

Q. Who was that?

A. That was his helper.

Q. Helper?

A. Yes sir.

Q. Now, what did he do on these previous trips when his helper would notify him that the car was coming?

A. He used to get out.

Q. Get out of the hopper?

A. Get out of the hopper.

Q. Did you see anyone notify him at this particular time? Did you see anyone notify him to get out of the hopper that he was injured in?

A. Yes sir.

Q. Who was it?

A. It was his helper.

Q. What did his helper do, if you know?

A. Well, his helper—his helper was not working with
127 him, you know. He was in the center of the track, you know, and he was right near where he was, that hopper was, you know.

Q. Well, now at this particular time he was injured, what did you see the helper do?

A. I saw him make me a sign to pass.

Q. Well, did you see him go to the hopper?

A. Yes, sir.

Q. But you couldn't see Mr. Hammer?

A. No, I couldn't see Mr. Hammer.

Q. And he went to the hopper now, as I understand you?

A. Yes, sir.

Q. Then what did he do?

A. He went to the hopper and he told Mr. Hammer to get out.

Q. Could you hear him tell him that?

A. No, I saw him talking to him. I don't know what he said.

Q. You saw him go to the hopper, however.

A. Yes sir.

Q. And then what did the helper do?

A. Then the helper make me a sign to pass.
Q. What, to come on?
A. Come on.
Q. Did you see any other sign?
A. No sir.
Q. That is all you saw now, was it?
A. That is all I saw.
Q. And you in obedience to his signal, you passed on?
A. Yes sir.
Q. Up to the hopper, and how far did you go past it, if you went past it at all?
A. Oh, about five feet, about five feet.
Q. Five feet. When was the first time that you knew that Mr. Hammer was in that hopper?
A. I did not know that he was in that hopper before.
Q. Did you hear any cries, any noises, anybody holler?
A. No, I never seen nobody.
Q. Was there much noise up there?
A. Yes, there was noise but it was pretty far where I was, you know, where I was standing behind the hopper, you know.
Q. I didn't hear the answer to that last question.
A. I say I never heard no noise. It was pretty far where I was you know.
Q. From the hopper?
A. From the hopper, about twenty or twenty-five feet.
Q. The back end of your car, I understand, went four or five feet beyond the hopper?
A. Yes.
Q. The back end of your car?
A. Yes sir.
Q. Is there not a lot of noise up there from the machinery?
A. Yes, the steam and everything of that machinery, you know.
Q. Steam?
A. Yes sir; steam there.
Q. Now, all you depended on in the movement of your car was the signal from Mr. Hammer's helper?
A. Yes, sir.
Q. When he signalled you to come on you would come?
A. Yes sir.
Q. Did you on this occasion as well as on other occasions while Mr. Hammer was working on that feed-floor, stop within twenty—or twenty-five feet of the hopper?
A. Yes sir.
Q. The hopper he was workin in?
A. Yes sir.
Q. You never failed to do that?
A. No sir.

Mr. Curley: I object to those leading questions, if your Honor please.

128 The Court: Well, you will have to object before they are answered.

Mr. Curley: I tried to get it in before, but I hope counsel will refrain from leading this witness.

The Court: Proceed.

Mr. McFarland:

Q. How many hoppers, so far as you know, were repaired by Mr. Hammer on that feed-floor?

A. Well, I am not very sure. I believe there was about two or three hoppers, I guess.

Q. It might be four or five. Now, tell the jury what was your habit in respect to stopping your car, if you did stop it, any distance from the hopper in which Mr. Hammer was engaged in work.

Mr. Curley: I object to that as immaterial.

The Court: I will sustain the objection, because the witness has already testified that he always stopped without any exception when he got about twenty-five feet from the hopper, and that went in without objection. I sustain the objection to the last question.

Mr. McFarland:

Q. Was anybody else——

The Court: Then I also sustain it upon the ground that the witness may not testify to his habits on previous occasions.

Mr. McFarland: May I amend that and ask him what he did?

The Court: Yes.

Mr. McFarland:

Q. What did you do in reference to stopping your car when you approached a hopper in which Mr. Hammer was engaged at work.

Mr. Curley: Objected to.

The Court: Objection sustained, because the witness has already answered the question.

Mr. McFarland:

Q. Who was on that feed-floor besides yourself and Mr. Hammer's helper, if you know, on that day?

A. On that day? Well, I don't know. I seen his helper and the other fellow working in one of those fettling cars; that is all I know.

Q. Was Mauro Provencio there at that time?

A. Yes, that is his helper.

Q. That is his helper. Well, was Gustavo Provencio there?

A. Gustavo was, yes. He was running that fettling car.

Q. Running what kind of a car?

A. Fettling car.

Q. How was that run?

A. Well, that is a small car, you know; they have to push it, you know.

Q. They have to push it?
A. Yes.
Q. You say you saw him there at the time Mr. Hammer was injured just after Mr. Hammer was injured, or just before?
129 A. He work there all day, that fellow, running that car.
Q. All day?
A. Yes, he work all day.
Q. And did you see him there at the time, either before or just after Mr. Hammer was injured.
A. Yes, I saw him with a broom there sweeping the track with the broom. I saw the fellow, Gustavo.
Q. Do you know Mr. Bentley?
A. Yes, I don't know him; I just know him——
Q. Did you see him there at the time Mr. Hammer was injured?
A. No, I never seen him.
Q. Either before or after?
A. I saw him after he comes.
Q. After?
A. Yes sir.
Q. Did you see him before?
A. No sir.

The Court: I did not understand one answer of this witness, or the question either. May I ask him a question here?
Mr. McFarland: Certainly.

The Court:

Q. When your car reached the point where Mr. Hammer was hurt, did it stop?
A. Yes sir; I stopped about five foot, you know, five foot behind, you know. After I passed from the hole, you know.
Q. Before you reached the hole?
A. Oh, twenty or twenty-five foot, I say.
Q. Then did you stop when you got over the hole, when your car was right over the hole, did you stop then?
A. No sir; no sir.
Q. You did not stop?
A. No.
Q. Why did you stop when you got on the other side of it?
A. Why, I stopped to help Mr. Hammer get out, you know.
Q. How did you know he was in there?
A. How?
Q. How did you know that he was in there?
A. Well, I did not know he was in there; after I saw him the car passed you know.
Q. Did you see him or did you hear him?
A. I hear him there.
Q. Had you passed over the hole when you heard him?
A. When I heard him crying?
Q. Yes.
A. Yes, I passed over the hole when I heard him.

Q. You stopped the car to assist?
A. Yes, to help him out.

Juror Rider: If the Court please, may I ask the witness a question.
The Court: Yes.

Juror Rider:

Q. Were you working under orders each trip? Did you have a special destination to make each trip?

The Court: Well, he probably does not understand what destination means.

Juror Rider:

Q. Well, did you have a special—anyone place to stop? On that trip where would you have stopped if you hadn't received any signal?
A. No, I did not.
Q. If you hadn't received any signal where would you have stopped under orders, or your custom?
A. About thirty foot, thirty-five.
130 Q. Of where?
A. From the hole, you know, from this place, you know.
Q. From which place?

The Court: He wants to know where you were going with the calcine.
The Witness: With that, where I was going with that car?
The Court: And where you would stop with it, where you would have stopped with it if you hadn't stopped there at that time.
The Witness: Oh, I was going to get some lime, you know, to put in the car.
Juror Rider: That was on beyond that place?
A. Yes, mix it with that stuff.
Juror Rider: I just wanted to know what the destination of the car was.

The Court:

Q. How far beyond that place was it where you were to have gotten the lime?
A. Why, about forty feet, I guess.
Q. About forty feet?
A. All right.

Juror Rider: I just wanted to know what the destination of the car was, how it came to go over there.

Juror Wheat:

Q. Did they run that car at regular intervals, or was the car run just when it was necessary to fill it?

The Court: He probably does not understand what regular intervals means.
Juror Wheat: Well, frame it up.
The Witness: I would like to——

The Court:

Q. How often did the car run from the place where you got the calcine down to the place where you were to get the lime?

A. Well, I say just about forty feet.

Q. No. How, often I say; did you run every hour or every half hour? Did it have a scheduled time?

A. Yes, it run about every hour, I guess—put a load in there.

Q. Just about every hour?

A. Every hour.

Mr. McFarland:

Q. Would that depend upon the needs of the furnace, how often you brought calcine in there; how often the furnace needed it?

A. Yes, that depends how the furnace is, you know.

Q. Would anybody tell you when to go and get the calcine and when to bring it back?

A. Yes sir; they tell me when the charge.

Q. Who was that would tell you that?

A. The skimmer, you know.

Q. The skimmer, he told you when to go after the calcine?

131 A. Yes.

Mr. McFarland: I understand the juror to ask the question if he stopped uniformly at some point.

Mr. Rider: My question was, Mr. Counsel, what was the destination of the car and where would he have stopped if he had not received any signal. I just wanted to know where the car was accustomed to go. That was my object.

Mr. McFarland:

Q. Do you know whether or not it was the intention to release that calcine in the hopper in which Mr. Hammer was engaged in working; was it the purpose to put the calcine down in that hopper?

A. No, that furnace that they was repairing, you know. We couldn't put no calcine in that hopper there.

Q. Now, you say that the purpose of going over that track was to go to a bin that held——

A. Lime, you know.

Q. —lime, and then what was the destination of the car from that lime bin.

A. Well, I don't know. They got——

Q. Had you any instructions as to that?

A. Yes, I had instructions, you know. I got to mix it up with the calcine, and then put it in the furnace again, you know.

Q. It wasn't your intention to discharge that calcine into the hopper in which Mr. Hammer was at work?

A. No.

Q. It wasn't your intention to put that calcine in there?

A. No, I had no intention.

Q. What did you stop for after you got over the hopper in which Mr. Hammer was at work?

A. How is that? I didn't hear you.
Q. Why did you stop after you passed over the hopper in which Mr. Hammer was at work? Why did you stop?
A. Why, I stopped to help him out of there.
Q. How was it that you knew that Mr. Hammer was in that hopper? How did you know he was in there?
A. I didn't know he was in there. After I got by I know, after.
Q. I know, but what called your attention to the fact that he was in there? What was said or done by anybody that you found out that Mr. Hammer was in there? How did you know he was in there?
A. How I knew he was in there?
Q. Yes, how did you know Mr. Hammer was in there after you passed over him?
A. Well, I see him.
Q. Did anything——
A. I stopped my car.
Q. Did you hear him?
A. Yes, I hear him, you know.
Q. What time was that?
A. What?
Q. When your car was passing over him?
A. Yes, when the car was passing over him.
Q. Then did you see him after you looked back, after you stopped?
A. Yes, after I stopped, I see him.
Q. Did you see that calcine flowing out of that car?
A. No sir; I did not see it until after I stopped the car, you know.
Q. You saw the calcine after you stopped the car?
A. Yes sir.
132 Q. Well, did that indicate to you that there was something wrong?
A. I didn't see anything wrong, I guess.
Q. If you had seen the calcine flowing out of that car without its being turned loose, wouldn't you have thought that there was something wrong?
A. I thought they leave——
Q. What?
A. I couldn't tell about that accident, because I was inside of the car, you know, I couldn't know anything.
Q. You don't know what caused it?
A. No, I didn't know.
Q. Well, was that car in good condition?
A. I think so.
Q. So far as you knew?
A. Yes.

Mr. McFarland: Cross-examine.

Cross-examination.

By Mr. Kearney:

Q. How many tons of calcine did that car hold?
A. Well, about fifteen tons.
Q. How many thousand pounds in each ton?
A. Two thousand.
Q. Two thousand?
A. Yes sir.
Q. How does the calcine get out of the car?
A. Well, you have to open some drawer they have, you know.
Q. Is that opened with a lever?
A. Yes sir, they have got some handles to open, you know.
Q. That lever pulls a little hard, don't it, too?
A. Yes, sir.
Q. And the hopper in which Mr. Hammer was doing this repair work was not in use that day at all, was it?
A. No sir; it was not in use at all.
Q. You had no orders to dump any calcine in that hopper, did you?
A. No sir; I didn't have no orders to dump it in there.
Q. If that car had been all right, the valves properly closed, it wouldn't have dropped any calcine in that hopper, would it?
A. Well, I don't know. The car, I believe, it was all right. I don't know. I couldn't tell what happens, what happened to this, what happened to the door, you know.
Q. Is it a part of your duty in taking that car along to see that that door is closed?
A. No.
Q. Don't you open that door and let out the calcine?
A. Yes, I open it.
Q. Then it is your business to close that door and shut it, isn't it?
A. Yes, sir, it is my business to close it and shut it.
Q. Then it was your duty, and you went along there, to see that the door on that car that let the calcine out was closed?
A. Yes, it was closed.
Q. Then, if the bottom of that car, trap-door, that lets it out, had been closed——
A. Yes.
Q. —It would not have spilled any calcine?
A. No, it would not have spilled any calcine, no sir.
Q. So that you must have been bringing that car along there with the bottom of that car open?
A. No sir, it was closed.
Q. If it was closed, how did that calcine get out?
A. I cannot tell, it was an accident.
133 Q. It was an accident?
A. Yes sir.
Q. Did that kind of an accident ever occur there before?
A. No sir.
Q. You don't remember any time, do you?

A. No sir.

Q. When calcine dropped out of the bottom of that car?

A. No sir.

Q. If that car—that door that is the slide-door at the bottom had been properly closed——

A. Yes sir.

Q. —if it had been when it passed over where Mr. Hammer was working, it wouldn't have injured him, would it?

A. No sir.

Q. Then if the door there, as it should have been, was properly closed that car would have passed over where Mr. Hammer was at work without injuring him any—wouldn't have burned him, because no calcine would have poured down; isn't that true?

A. I don't understand you very much.

Q. You don't understand?

Mr. McFarland: We want to get all the information for the jury that we can, but we do not think what the car would do or would not do, or what the car should do, is at all material. I think the fact that an accident happened while this party was in the employment, caused from a condition or conditions of employment, while he was engaged in the particular employment for which he was engaged, would be the only question for the jury.

The Court: Well, do you remember that you asked this witness the question whether it was not—whether it was or was not the intention of the witness to pour this calcine in that particular hopper?

Mr. McFarland: Yes sir.

The Court: And the witness answered that it was not.

Mr. McFarland: That is true.

The Court: Now, isn't it proper on cross examination to explain how it happened to get in there?

Mr. McFarland: Oh, I think so.

The Court: Well, in doing that, isn't it impossible to do that without showing facts——

Mr. McFarland: As to the facts, of course, your Honor, I have no objection to his showing them.

The Court: Those are the facts.

Mr. McFarland: I called this fact to the attention of the witness—if it was his intention to discharge that calcine in that hopper. He said no, that his intention in carrying that calcine along that track was to go to get lime for flux.

The Court: I believe that it is proper cross-examination. I will overrule the objection.

Mr. McFarland: Note our exception.

134 The Court: You will have to re-frame that question because it embraces two questions and is not understandable.

Mr. Kearney:

Q. If the slide-doors on that car had been closed, the car would have passed over where Mr. Hammer was at work and wouldn't have burned him any?

A. No sir.

The Court: Now you ask two questions there. You ask him in the affirmative and the negative.

Mr. Kearney: This witness here knows.

Q. Do you mean that it would not have injured him?

The Court: Now you ask if it would have done so and so, and you ask if it wouldn't have burned him. The witness cannot answer that.

The Witness: I wish I had an interpreter, you know, so I explain better, you know.

The Court: Come around, Mr. Interpreter. Now, I don't mean to suggest to counsel how to frame their questions at all. It isn't with that desire, but if counsel on both sides will ask short questions, especially of witnesses who are not Americans—even where they are, I believe that they would understand better, and all of us would get a better understanding from their answers However, you will frame the question to suit yourself. Proceed.

(The following testimony was given through the interpreter:)

Mr. Kearney:

Q. If the slide-doors on that car that let the calcine out had been closed, then that car would have passed over the hopper where Mr. Hammer was at work and none of the calcine would have been emptied into the hopper.

A. But the doors were closed.

The Court: That isn't an answer to the question. If the doors had been closed would the calcine have dropped out, run out?

A. No, it wouldn't have leaked out.

Mr. McFarland: Let him explain. What does he say, Mr. Interpreter?

A. The doors were closed, but I don't know what might have happened that opened the door.

Mr. Kearney:

Q. Then on your way down you think that something opened the door on that car?

A. I believe that something was left on the track that opened the doors.

Q. In coming down you didn't see Mr. Hammer at all, did you?

A. I didn't see him. I only saw his helper that was standing there in the middle of the track.

Q. You didn't see Mr. Hammer until you had passed over him?

A. Until I passed by.

135 Q. During the nine or ten months that you were motorman on this car did such an accident as that happen before, that the slide-door of that car came open and allowed the calcine to spill out?

A. It never had happened anything like that before.

Q. Then in your movement of going forward you were guided by a motion that Mauro de Provencio gave you, is that right?

A. When he made me a sign I pass by.

Q. Is Mauro a relative to you?
A. He is a cousin of mine.
Q. And you had no idea that Mr. Hammer was there that day at work in that hopper, did you?
A. I had an idea that he was working in the other side of that hopper, on one side of that hopper.
Q. Now you say you had about how many years—how much experience in running a motor car?
A. About a year.
Q. Well, from December of last year up until September, 1911 of this year, were you running that car as motorman?
A. I don't remember the date when I began running that car, but I believe it is about a year.
Q. When did you quit running the motor car?
A. We work eight hours and we quit at three o'clock in the afternoon.
Q. Did you run that motor car from last December up until the 11th of September of this year?
A. I work a year on that car, but I don't remember the date that I began to work.
Q. Do you know whether you ran that car from December to the 11th of September of this year?
A. I run the car, I believe, in August it was. In August since I began to run the car.
Q. Did the company ever lay you off?
A. Never have suspended me from work.
Q. Since this accident they have laid off a good many men, haven't they, but they didn't lay you off?

Mr. McFarland: If the Court please, I don't think it is material whether a good many men were laid off, nor how many continued.
The Court: Objection sustained.
Mr. McFarland: Nor how many men quit on the 11th of September.

Mr. Kearney:

Q. Are you still working for the company?
A. No, we are not; everything is at a standstill over there now.
Q. Are you drawing any pay from the company?
A. Nothing only expenses now.
Q. Well, when did you quit?
A. The 11th day of September.
Q. That was when the strike was called on there, wasn't it, everybody quit?
A. Everybody quit then.
Q. Well, that was caused by a strike there, wasn't it, everybody quit?
A. Yes, on account of the strike.
Q. What do you mean by expenses, paid your expenses here?
136 A. Well, they are paying my room and my board.
Q. They are paying your expenses, some of them, when you were there?

A. No sir.

Q. Did you ever tell anybody what you could or would testify to as a witness if you were called on this trial?

A. I have not.

Q. When you run over Mr. Hammer did you go back and help get him out of the hopper?

A. I only helped to put out his clothes.

Q. Every time you brought a car down would you go over and get lime for it?

A. Every time. It was the standing order there, every time. That was the standing order I had.

Q. For every car?

A. Every car, every trip.

Q. Do you know how many yards in twenty-one feet?

A. A yard is thirty-six inches.

Q. What?

A. A yard is thirty-six inches.

Q. Did you ever have any special instructions in electricity?

Mr. McFarland: Well, now, if the Court please, I object.

The Court: Objection sustained.

Mr. Kearney:

Q. Didn't you make a statement at the time, just after Mr. Hammer was injured and burned there, when you were asked why you would not stop, or why you did not stop, or why you went over him, and that you then and there stated in response to a question asked by Mr. Bentley, didn't you make such a statement there to the helper that the brakes in your car would not work, or words to that effect.

The Court: Are you withdrawing your first question?

Mr. Kearney: That eliminates the first question about Mr. Bentley.

A. No, I never told him anything like that. I did not have an opportunity to speak to the helper. They took him away to assist Mr. Hammer.

Q. Don't you know, as a matter of fact, that the brake shoes on your car were tightened and repaired immediately after this injury?

Mr. McFarland: I object to what occurred after the injury, I object for another reason; that what counsel is attempting to show by that fact or by the inference from that fact, that the company was negligent.

The Court: Objection sustained.

Mr. Curley: Oh, no, if your Honor please, if you will permit me to argue after the ruling. The purpose of that was not for the purpose of showing negligence, but to impeach the testimony of the witness, where he has testified that he came down and he stopped his car and the like. Now the purpose of that was to impeach that; that he afterwards stated that the brake-shoes would not work was

the reason, and then ask him, as a matter of fact, that immediately afterwards if the brake-shoes were not repaired and tightened.

137 It is not for the purpose of showing negligence. That isn't the purpose at all. It is for the purpose of impeaching the witness.

Mr. McFarland: They might have been repaired afterwards, if your Honor please, but the question is did it stop then.

The Court: No, I don't think the question that was asked has reference to the failure to stop before the accident.

Mr. Curley: The first question was if he did not state at the time that they would not work. Now the next question was asked him if he did not know that immediately afterwards they were repaired, for the purpose of breaking down his testimony—not for the purpose of showing negligence; and the Court may so instruct the jury, that that isn't the purpose; that it is for the purpose of breaking down his testimony and not to show negligence.

The Court: Well, it being immaterial, Mr. Curley, you cannot impeach the witness on any question that is not material to the issue.

Mr. Curley: It is material as against his testimony that he came up and stopped, and that they further motioned for him to come ahead. Now, it has been testified to here by Mr. Bentley that the car came right straight down without stopping. Now the question is asked him if immediately after the injury he did not state to the helper when asked why he did not stop that his brakes would not work. Now, he has denied that. Now following that up, and for the purpose of still further impeaching his testimony, the question was asked if he did not know as a matter of fact that immediately after that, these brake-shoes were fixed. That is the purpose of it, if the Court please—not to show negligence.

Mr. McFarland: Well, if the Court, please, I do not think that would be material, because Mr. Hammer himself, stated that that car stopped about twenty-five feet or thirty feet before it reached that hopper in which he was in.

Mr. Curley: No, he did not.

Mr. McFarland: That is my recollection.

Mr. Curley: Your recollection is wrong.

Mr. McFarland: Well, the record will show.

The Court: Read the question.

(Question read.)

The Court: Objection overruled. Answer the question.

Mr. Curley: Just a moment, if your Honor please.

The Court: Let him answer if he can. I feel that you gentlemen must *no* speculate with the court in any such way.

138 The Interpreter: He is not answering your question.

The Court: Well, tell us what he says.

A. There was nothing wrong that I knew with the brakes.

The Interpreter: He is starting to explain how and he did not finish.

The Court: Go on.

A. There was nothing wrong with the brakes, or the shoes, or the brake-shoes. There must have been something left on the track that interfered with the doors.

The Court: The question is whether or not he stated immediately whether or not the brake-shoes were repaired,—the brakes were repaired immediately after he stopped, or after Mr. Hammer was injured.

The Witness: I testify that the brakes were not repaired, that they continued to use the car as it was.

The Court: Well, the question is whether you—I believe that answers the question. Stand aside. Call *you* next witness.

Mr. McFarland: It is twelve o'clock, if your Honor please.

The Court: Gentlemen of the jury, you are not to discuss this case among yourselves nor permit anyone else to discuss it in your presence or hearing, or form or express any opinion as to the merits of the case until it has been finally submitted, to you. Report at half-past one.

FRIDAY, November 26, 1915.—1.30 p. m.

The Court: You may proceed.

Mr. McFarland: I want to ask the witness who was on the stand just before the noon recess one question.

ESTANISLADO PROVENCIO called as a witness on behalf of the defendant, resumed the stand and further testified as follows.

Redirect examination.

By Mr. McFarland:

Q. In reply to a question—I think he can understand me, Mr. Interpreter without you. You testified just before the court adjourned at the noon recess in reply to a question that Mr. Kearney asked you, if you had talked to anybody about this case—you said no. Did you mean to include in that the attorneys of the company, or the defendant?

A. No sir.

Q. You have talked to me about it?

A. No sir.

139 Q. I say you have talked to me about it, haven't you?

A. No, I never spoke to anybody about it.

Q. Did you ever talk to me?

A. Oh, yes.

Mr. McFarland: That is all. That is what I want understood.

Recross-examination.

By Mr. Kearney:

Q. Immediately after this accident took place you were called down in Flynn's office and there you made a statement, didn't you?

A. Yes, sir.

Mr. Kearney: That is all.

(Witness excused.)

GEORGE W. FRASER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. Your name is George W. Fraser?
A. George W. Fraser.
Q. Where do you live, Mr. Fraser?
A. Clifton, Arizona.
Q. How long have you lived there?
A. Since the 10th day of November, '84; thirty-one years.
Q. What have you been doing in Clifton during those thirty-one years?
A. I was, while the old smelter was running, superintendent of the old smelter. At the new smelter I was general foreman of repairs.
Q. For*me*an of——
A. I was general foreman of repairs of the new smelter.
Q. General foreman of repairs. As such foreman would the repair of fettling tanks or hoppers come within your jurisdiction?
A. Well, it did in a way although I had a foreman under me who usually looked out for the work.
Q. Your position was over that foreman?
A. No, over my instruction.
Q. Have you a blueprint of the feed-floor of the smelter?
A. Yes, I think I have a print here, and also of the hopper.
Q. Of the hoppers and your railway track?
A. And the railroad track, also.
Q. Is this blueprint a correct reproduction of the *sti*uation——
A. The exact situtation.
Q. —on the feed-floor?
A. This is a blueprint from the construction, the man who put the hoppers in.
Q. Is it correct?
A. It is correct, as far as I know. They were put in according to that blueprint.
Q. And the situation there now is just as this blueprint shows?
A. Just as it shows there.
Q. And was on the 28th of December, 1914?
A. Yes, I think so.
Q. It is just the same now as it was then?
140 A. Just the same, that is the blueprint that the business was installed from.
Q. And it was installed just as this shows it?
A. Just as it shows it.

Mr. McFarland: Now, if your Honor please, I will ask to have it filed for identification as Defendant's Exhibit 1, I do not know just how we are going to manage it so that the jury can see the situation as shown by this blueprint.

The Court: Any objection to the blueprint?

Mr. Kearney: We haven't had a chance to examine it or ask any cross questions about it.

The Court: Submit it to counsel.

Mr. McFarland: No, I am offering it for identification and then I want the witness to use it to explain his testimony.

Mr. Kearney:

Q. Mr. Fraser, did you make this yourself?
A. Did I make that myself?
Q. Yes sir.
A. No, I did not.
Q. Do you know when it was made?
A. It was made by one of the engineers of the construction plant, I think it says on it there.
Q. Don't you know when it was made?
A. I beg your pardon.
Q. Don't you know when?
A. It was last year, I think, 1914. You will see when.
Q. That don't matter, any date that is on there. You can put any date on that. Do you know when this was made.
A. I know when they were installed.
Q. When they were installed?
A. When the hoppers were installed.
Q. I say, do you know when this map was made?

Mr. McFarland:

Q. Do you know when it was made?
A. Well, I don't know just exactly when that was made, since the smelter has been running.

Mr. Kearney: Well, bring it over here.

The Witness: It gives the date on it when it was made.
Q. What?
A. It gives the date on it when it was made.
Q. No matter about that date, but don't you know of your own knowledge?
A. Don't I know what?
Q. Don't you know when it was made?
A. I can't give the day when it was made.
Q. Did you have anything to do with making it?
A. Did I have anything to do with it?
Q. Yes sir.
A. No, I did not.
Q. Did you yourself take the measurements for making it?
A. I did—no, not for making that; I did not.
Q. Did you ever check up all the figures on this map?
A. Part of them I have.
Q. Part of them?
A. Yes.
Q. Then of your own knowledge, your own personal knowledge, you don't know that this map is an absolute correct map.

A. According to the part that I recollect here—that we are here to refer upon.

141 Mr. Kearney: Well, we object to it. I don't think it is sufficiently established.

The Court: What is the objection.

Mr. Kearney: We object to its introduction in evidence. We do not think it is sufficiently proven that it is correct. He testifies that he did not make it himself. It was made by another person and he never checked up the figures on this and it is not one that was made under his supervision. He did not make it himself. Another person made it.

The Court: Objection sustained.

Mr. McFarland: If the Court please, I think the witness testified that so far as the parts in which that map are relevant to the issues in this case are concerned, that it is correct, that he checked it up.

The Court: Well, you cannot introduce a map that is identified in that way.

Mr. McFarland: Well, I will ask him just a few questions.

Q. In respect to the hoppers as shown by this blueprint, is it correct—does it show a correct reproduction of those hoppers?

A. It does.

Mr. Kearney: I object to that as a leading question.

The Court: When an objection is made, just wait until the court passes on it.

Mr. Kearney: We move to have the answer stricken out.

The Court: The map may be used as illustrating the testimony of this witness, but it is not admitted as an accurate and correct representation of the situation as it existed at the plant in question at the time in question. It has not been shown that this witness made the map, or saw it made, or knows that all the measurements thereon are correct, and for that reason the objection is well taken—is sustained.

Mr. McFarland: If the Court will permit me, I offer this map in evidence for the purpose of showing that the position of the hoppers as shown by this map is correct; also for the purpose of showing that the two lines of broad-gauge railway as shown by this map are correct, and for the purpose of showing the lines of railway—sixteen-inch gauge railway as shown by this map are correct, and for the purpose of showing the track of this broad gauge—both of the broad-gauge railways from the point where the calcine was obtained to and across the floor of the feed-floor of the smelter. And I further avow that if those questions were permitted to be asked of the witness, that he would so testify.

The Court: Any objection to that offer?

Mr. Kearney: I object. It isn't sufficiently established.

The Court: Objection sustained.

142 Mr. McFarland: Note our exception.

Q. Now, you can take this map for the purpose of illustrating

your testimony. Now, are there any lines of railway on what is known as the feed-floor of the smelter?

A. The two standard gauge-railroad lines and a twenty inch railroad called the fettling track.

Q. Is that shown by that diagram that you have?

A. Yes, it is shown, part on this one, and part on another diagram I have here.

The Court: Is the engineer that made that present.

Mr. McFarland: No sir, I don't think so. It was made before the smelter was constructed, and it was constructed on the plans set forth on that diagram.

The Court: Go ahead.

Mr. McFarland:

Q. Will you mark by some appropriate figure where those lines of railway, both broad-gauge and the narrow-gauge, are?

A. The two standard.

Q. That won't do. Take a pencil or pen, and by some means of identification just put something, "A" or "B" or "C" of "D."

The Court: It may be marked for identification. I thought it had been marked for identification.

Mr. McFarland: So as to identify on that particular map where the particular object inquired about is.

The Court: Very well, mark it.

A. There is the broad-gauge here.

Mr. McFarland:

Q. Now, mark that "A."

A. This is a space between.

Q. Mark it all "A."

A. This is a space between the tracks.

Q. There is a bin there, isn't there?

A. Yes, there are fettlings.

Q. Now, mark, if you will, "B", where the narrow gauge is.

A. It is on this other plat.

Q. On this one?

A. No, it is this one, this is it here.

Q. Mark that "B".

A. This is the fettling track.

Q. Narrow gauage?

A. Yes.

Q. Now, are there any fettling bins or hoppers on that floor?

A. Well, there are six. There are six small fettling bins on that feed-floor to each furnace.

Q. Will you mark on that blueprint which you are using to illustrate your testimony with, the letter "C" where those fettling bins are.

A. Well, the same as what I have marked already "A."

Q. They are the same?

A. The ones that are marked "A" are the fettling bins.

Q. How do those lines, the railway lines running on that map,—how do they run?

A. The broad-*guage* runs across the fettling bins and the twenty-inch runs parallel with them.

143 Q. Parallel with it, or at right angles with it?

A. Parallel with the fettling—over the top of the fettling bins, but the broad-gau*o*ge runs across them.

Q. Now, are these furnaces fed by the car that goes over the narrow gauge?

A. Well, they are fed in a way. They are fettled. The narrow gauge is the fettling track. It runs the entire length of the furnace, each side of the furnace over the top of the brick walls, discharges crushed ore. The fettling is crushed ore from three-eight-s to a quarter to three-quarters of an inch. The ore is crushed to that size, and this fettling car, push car, runs across on a twenty-inch gauge on top of the fettling bins and discharges this ore into these bins and runs down into the furnace and protects the brick wall.

Q. Now, does the car that travels the broad-gauge line, does that feed these hoppers with ore?

A. It dumps its ore into the center of the furnace.

Q. *T*hat is that?

A. That is the calcine car, it discharges into the center, into a hopper into the center of the furnace.

Q. Then I understand you that the narrow-gauge discharges ore——

A. Discharges crushed ore into the side walls, into the side of the furnace.

Q. And the broad-gauge cars discharges only calcine.

A. Calcine, limestone or slag, or whatever is required into the center of the furnace.

Q. What is the surface of this feed-floor covered with?

A. What is it covered with? It is covered with sheet iron.

Q. All over?

A. All over, quarter-inch sheet iron.

Q. Is there anything between this sheet iron and the rails on which these cars run?

A. Anything between the rails and the sheet iron?

Q. No, I mean up to the rails. What do the rails of the track rest on?

A. Well, the- rest on thitry-inch I-beams.

Q. Thirty-inch I-beam?

A. The thirty-inch I-beam runs right from one end of the building to the other across the furnaces, across over the top of the first section of the furnaces.

Q. These cars run right along?

A. Right along over top of the furnaces.

Q. Run parallel with these I-beams?

A. Yes, with these I-beams. It shows on this drawing, the track and these I-beams, where they run over them.

Q. Did you say how deep those I-beams are?
A. Thirty-inches.
Q. From the top of the feed-floor to the bottom?
A. From the top to the bottom is thirty inches.
Q. Now, where are these fettling pots situated with reference to these I-beams?
A. The fettling hoppers?
Q. Yes.
A. They run between the tracks.
Q. Narrow-gauge or the broad-gauge?
A. The broad-*guage* track.
Q. About what position in the track, center or side?
A. Well, there is three at each side of the furnace. The broad-gauge track runs right across the west side. There is one in between this broad-gauge track at each side of the furnace. Then
144 there is a space of about four feet to the east side. There is one in between that. Then the east track, there is one also in between the tracks. It makes three on each side.

The Court: Isn't there somebody here that can make a map on the part of the company?
Mr. McFarland: We have got it right here.
The Witness: There is a sketch here from this draftsman here in town.
The Court: Who made it?
The Witness: Made by Hastings or Hoskins, or somebody down there.
The Court: Isn't there somebody here representing the company that can draw a map?
Mr. McFarland: Only that one, the one that it was constructed by.
The Court: Can this witness draw that; these hoppers and the things about which he has been testifying?

Mr. McFarland:

Q. Can you do it.
A. No, I am not a draftsman.
The Court: You don't have to be a draftsman. One that is drawn without a scale and approximately correct.
The Witness: Yes sir.
The Court: Well, that has not been identified as being correct.
The Witness: Here is one I suggested. Of course, it was just off this map here, to a draftsman. I suggested it on a larger scale. I wouldn't undertake to make one myself.
Mr. McFarland: Now, if your Honor please, this is the one that was used on the cross examination of Mr. Hammer, and is filed for identification, but not introduced in evidence, for the reason that it is not technically accurate.
The Court: Who made it?
The Witness: It was made at a suggestion of mine by this draftsman.

Mr. McFarland:

Q. Who made this?
A. This draftsman that lives—Hastings. He lives across from the postoffice.
Q. At whose direction did he make it?
A. From my instruction.
Q. Is it correct?
A. Yes, there is only one alteration to be made on it, and that is this hopper here. There is a little change in the width from that.
Q. In the width.
A. Question of distance of two inches.
145 The Court: Any objection? Submit it to counsel.
The Witness: It is just a sketch showing the tracks, you know.

Mr. Kearney:

Q. Mr. Fraser, does this show all three of the hoppers?
A. What is that?
Q. Does this show all three of the furnaces?
A. It don't show the hoppers.
Q. No, not all of them?
A. I can't hear what you say.
Q. It don't show all three of the furnaces.
A. It shows the only furnace on that we have reference to.
Q. Say, Mr. Fraser——
A. Yes.
Q. Did you stand over this man when he made it?
A. Right at the table when he made it.
Q. You did?
A. Yes, right at the table.
Q. You stood at the table. Did you tell him what to do exactly?
A. I told him what to do, yes.
Q. Make each figure and line?
A. Yes, make these lines without a map or anything. These maps just come last night.
Q. Why didn't you do it yourself then?
A. What is that?
Q. If you knew so much about it why didn't you do it yourself?
A. Well, he claims to be a draftsman. I don't claim to be a draftsman, and I wanted to put it down in form so you would understand it.
Q. Oh, you had my interest in view.
A. What?
Q. You were looking out for my interest.
A. Well, it was part for your interest.

The Court:

Q. It is correct, is it?
A. It is correct.

Q. Does it correct- represent the things purporting to be represented by it?

A. It was as near to my knowledge—only the hopper, the bottom of the hopper; I wasn't sure whether it was twenty-four inches from my own knowledge, or thirty inches; and that was the only objection I had to the hopper there. I did not know.

Mr. McFarland:

Q. Well, do you know it now? Do you know the exact dimensions?

A. Well, only I know it that that was thirty inches, because I noticed on this map here.

Q. That is, you have got it twenty-eight there.

A. I got it twenty-four, but I wasn't sure whether it was twenty-four, and I told this other gentleman that I did not—wasn't sure of the measurement.

Mr. Kearney:

Q. Is this a true representation of all the hoppers?

A. That is a true representation of the one, of the third one that we are figuring on. I went into the hopper and measured it myself, that one hopper where Mr. Hammer was burned.

Q. This don't show the relation then to the other hoppers at all.

A. No, it don't show nothing in regard to the other hoppers. They are all about the same. This plan here, the drawing, the original drawing, and the construction of the work shows that the hoppers there wasn't about half an inch of even, anyway. That was just a sketch from my own observation.

146 Q. Is there any hopper on that floor three feet square?

A. Any hopper on that floor three feet square?

Q. Yes sir.

A. The center hopper is three feet square, the center.

The Court: The question is have you any objection to the map itself, the sketch.

Mr. McFarland: As corrected.

Mr. Kearney: I object to its introduction.

The Court: Objection overruled.

Mr. McFarland: Now, if your Honor please, may we have leave to correct the "twenty-four" to "twenty-six"?

The Court: Yes. Just let him go over there at the table and make the corrections.

Mr. McFarland: The dimensions of the hopper.

The Witness: This is thirty inches. Instead of thirty inches here, that is thirty inches, and this from the bottom of the hopper to the top of the hopper is twenty-seven inches; to the floor is thirty inches. It is twenty-nine and one-fourth inches from the bottom of the hopper to the level of the floor.

Mr. McFarland:

Q. As shown by the diagram there of the hopper on that sketch—

A. Do you want me to explain it?

A. —are the dimensions of the hopper shown on the digram correct?

A. They are correct.

Q. Now, does the other portion of the liagram represent the conditions?

A. Well, this is to my own knowledge.

Q. That is all you can testify to, isn't it, you- own knowledge?

A. I dictated to the engineer. He had a little sketch on paper.

The Court: I understand it has been admitted in evidence.

Mr. McFarland: I will ask leave to have it marked Defendant's Exhibit 1.

Q. Now, does that diagram, Defendant's Exhibit 1——

The Witness: Your Honor, there is one other small change I would like to make there.

The Court: You had better make it before it is admitted in evidence. He says there is another small change that he desires to make.

The Witness: That makes that change from the opening to the edge of the hopper eight inches instead of six. That is from here to there. There makes it thirty inches across now. It was twenty-four inches before.

Mr. McFarland:

Q. Now, Mr. Fraser, I will get you to explain this, what
147 you mean by these different things you have on this diagram. What does that represent?

A. This here is an end view of the hopper.

The Court: Now, Mr. McFarland, when you ask "what is that," the reporter cannot get it. He does not know what you are ta-king about.

Mr. McFarland: No, I beg your pardon, sir. Now, what is the representation on the diagram there marked "A," what is it intended to represent?

A. This is the end view of the fettling bin or hopper. We generally call it—some calls it a bin and others call it a hopper. I call it a hopper, generally. From here to the bottom is twenty-seven inches. In the two and one-half inch space from this point——

Q. Indicated by what?

A. Then there is two and one-half inches from the top of the charge hopper to the top of the floor—space that is open, and the space where Mr. Hammer was working at the time when he got burned.

Q. Now what is this?

A. That is the level of the floor, the line, the floor level here.

Q. What does this represent?

A. This represents the space of two and one-fourth inches from the top of the fettling bin to the top of the charge floor. There was a space—the charge hopper didn't come up to the floor.

Q. What do you mean by the projection from the bottom of this hopper, indicated by the letter "A" on this Exhibit 1?

A. This here is the pipe. Now, this is entirely over the side-walls of the reverberatory furnace. This runs parallel with the furnace along the side. This is a five-inch pipe. When the car discharges ore up here, then it runs down through the five-inch pipe and drops on the side-wall of the furnace for the purpose of protecting the brick walls. The fettling pipes—the ore goes down and covers entirely the brick walls over so that the flame, the heat don't smelt the brick. They attack the ore.

Q. Now what discharges that?

A. There is a twenty-inch push car that comes from the bins. This is that car here.

Q. What is discharged in there, and what by?

A. Well, the ore is discharged all the way from three-eight-s of an inch to three-fourths of an inch. In fact, sometimes I have seen them have an inch and a half ore.

Q. What do you mean by that, the size of the ore?

A. Size of the ore, yes. That is dumped in from the car which runs parallel with this track, dumped in there, in this bin, and when we want to fettle there is a gate in here. They open it and let the ore drop into the furnace.

Q. By what is that discharged, the large car or the small one?

A. Small one.

Q. The twenty-inch gauge?

A. The twenty-inch gauge.

Q. Now, I see you have drawn something on this defendant's Exhibit 1, near the bottom of the exhibit indicated by the word, by the letter "B." What do you mean by that?

A. This here is supposed to be the small fettling car, which comes from the bins. The ore bins is along in here. It gets its load here, and a man pushes it along, along this track until he comes to the turntable. This is the turntable here.

Q. What is that indicated by, "C"?

A. This is the turntable. The car is pushed on here and then turned to a right-angle and pushed along on here to discharge
148 its ore. These three openings here is the openings between the tracks, right over the first section of the furnace.

Q. Well, now, what is that indicated by on this plat?

A. Well, that is one, two, three hopper, I guess. I don't know what these figures are, but this is the hopper underneath the track. Also this one and this one, and this is the north side of the furnace. There is also a turntable there which goes along just the same.

Q. Indicated by the figure "6"?

A. Yes.

Q. "4", "5" and "6", is that right?

A. Yes.

Q. Now what does this indicate on this exhibit 1?

A. This is the broad-gauge track, the standard gauge track where the car, the calcine car comes in with its load.

Q. Indicated by what figures on that map?

A. By "7" and "8".

Q. Now, does that map show another broad-gauge track?

A. This is another broad-gauge track here, east, the east side, or the west side of that.

Q. It runs clear across?

A. It runs straight across. This is another broad-gauge track here.

Q. Indicated by what figures?

A. Indicated by "8" and "9." The number "2" here, or this space here, is the space between the two tracks.

Q. There is also a fettling bin under that?

A. There is a fettling bin at each side, yes, under that, the same as the others, the same as the other side.

Q. Now, on which one of these tracks was this car going on at the time of the accident, if you know?

Mr. Curley: I object to that. There is no showing there that Mr. Fraser knows anything about it.

The Witness: This.

Mr. McFarland: Never mind that one question. Do you know which of these tracks the calcine car was on when the calcine was discharged on Mr. Hammer?

A. On the west side.

Q. I say do you know that of your personal knowledge.

A. I know that is where Mr. Hammer got burned in that hopper on the west track.

Q. Which one?

A. It was on the west track.

Q. Indicated by what figure?

A. On the south side of the furnace.

Q. You mean this one or the one indicated by the figures "8" and "9"?

A. Yes.

Q. Now, do you know which one of the hoppers Mr. Hammer was in at the time of the accident, of your personal knowledge?

A. Yes, of my personal knowledge.

Q. The one indicated on the map by the figure "1"?

A. Yes.

Q. In the center of the map?

A. That is on the south side of the west track, the hopper on the south side of the west track.

Q. Now, Mr. Fraser, when this floor was originally constructed what were the sizes of the openings on the top of the feed-floor immediately above these fettling bins?

Mr. Curley: I object to that.

The Court: Read the question.

149 (Question read.)

Mr. Kearney: I object to that as immaterial.

The Court: Objection overruled.

A. Eight inches square.

Mr. McFarland:

Q. Were there any changes made in those openings later?
A. They were changed to twelve inches by thirty-six inches.
Q. Who did that?
A. Mr. Hammer on that furnace on this job.
Q. So that if I understand you correctly the openings above the fettling bins, or the hoppers, is one foot by thirty six inches now.
A. Twelve by thirty-six inches now.
Q. And that change was made by Mr. Hammer from eight by eight.
A. There was two holes eight inches by eight inches.
Q. So that the two holes have been enlarged?
A. Enlarged into one twelve inches broad by thirty-six inches long.
Q. And that was the situation at the time of this accident?
A. Mr. Hammer was doing that work.
Q. How far is the top of the hoppers below the surface of the feed-floor?
A. They were from two to two and one-fourth inches, the top of the hopper.
Q. That is, you mean the sheet iron covering of the feed-floor?
A. They were two and one-fourth inches from the top of the hopper to the top of the floor—a space.
Q. A space in there?
A. Of that much, two and one-fourth inches.
Q. How deep were those hoppers?
A. They were from the floor, from the level of the floor to the lowest part, thirty inches.
Q. How wide were those?
A. They were also thirty inches.
Q. Wide?
A. Wide, from the inside of the hopper, thirty inches.
Q. Well, were they square at the bottom?
A. No, they were round at the bottom.
Q. Will you show that to the jury, the shape of them at the bottom, just show that to the jury, please.
A. This is the shape of the hopper at the bottom. It has a round bottom. First it comes down square and then curves about a half-circle there, so it was thirty inches from the extreme point here to the level of the floor, and thirty inches from the inside diameter to this side, thirty inches across in width.
Q. Now, when they went to repair the hoppers by placing angle irons from inside, they would have to go down through that twelve by thirty-six hole into the hopper.

Mr. Kearney: I object to that as a leading question.

Mr. McFarland:

Q. How would he have to get in there to place these angle irons from the inside?

150 The Witness: Is there any objection?
The Court: No.

A. Well, there are several ways of doing that.

Mr. McFarland:

Q. I know, but how would he have to do that to place them in there in the way he did? Now how did he do it?

A. Well, he crawled down through that twelve inch hole, twelve by thirty-six inch hole. That is the way I understand Mr. Hammer done that.

Q. Now, was there any other method of performing that duty than getting down in that hole?

A. Well, I would think there would have been another method of doing it.

Q. What is that?

A. I would have had that work done from the outside. If I had been doing it myself I would have done it from the outside.

Q. Then you would not have gone into the hopper at all?

A. No, not go into it. I would have sat with my feet in it, on the floor.

Q. Could you take measurements in that way?

A. Oh, yes.

Q. How were those angle irons fastened to the hopper?

A. Well, I tell you, there is an angle iron here. I could explain if you would allow it, and the court. If the gentleman at the door will bring in that angle iron I have there.

Q. What was the length of the angle irons that were being placed in the top of those hoppers?

A. The measurements of that hopper was forty-four inches and three quarters.

Q. On top?

A. Inside, and the hole between the—the space between the top of the hopper and the floor was two and one quarter inches. At the end of the hopper there is a three-inch angle iron extends the whole way around to the top of the hopper, so this angle iron, this would set in this form.

Mr. McFarland: Here, if your Honor please, I think it would be well for the record to show at this point of his testimony that the witness is using an angle iron to illustrate his testimony.

Q. Now, what are the dimensions of that angle iron?

The Court: I suppose the reporter's notes will show that.

A. This angle iron is three inches, three by three by a quarter.

Q. What is the length of it?

A. It is forty-four inches and three quarters, the identical length as what was used in the hoppers.

Q. That length?

A. The space here indicates the three inch angle iron that was on the circular, on the end of the hoppers. It fits like so, against the inside of the hopper. The part here which kept in place was from

a bolt through this opening here, through the floor, and held in position so it could not move. These three bolts bolted up through the floor.

Q. What were those that you were speaking about that were in the fettling bin before you undertook to put these on?

A. This was put on to fill up the space, the two and one-quarter inch space.

151 Q. What was the purpose of that, do you know?

A. What?

Q. What was the purpose of putting those angle irons in there?

A. Well, the purpose of putting those angle irons was to keep the ore from falling over down onto the workmen underneath. When the man above filled the bins full up some little pieces overflowed and would come down and drop onto a man's head. Then, another, the greatest obstacle was it overflowed onto the top of the furnace, onto the top of the brick roof, and covered the brick roof about thirty inches, and then that kept the cold ore away from the bricks and smelted the bricks. They had to continually clean the rock off of the top of the roof so it was for that reason they put these on for to cover up that space.

Q. That space was two and one-half inches?

A. Two and one-fourth inches. This space here is where the angle irons was on the end. The angle iron where the sheet iron was riveted to.

Q. To make the box?

A. This three inch angle iron, the angle iron came over the space and completely covered the space, the whole of it.

Q. Now, you say you had placed angle irons similar to this?

A. It was identically the same as this angle iron that was used on these hoppers.

Q. I didn't understand you.

A. It was the same measurement. It might have been an eighth of an inch, or a little difference from this angle iron. This was the class of angle iron, three inches by three inches by a quarter.

Q. Answer this question. Had you performed a similar service in placing angle irons on any of those fettling tanks before?

A. The number 3 furnace had all been fixed before.

Q. By whom?

A. By, I think it was—I am not exactly sure who the man was, but I think it was Morris, another repairman.

Q. Under your direction?

A. Under me, yes.

Q. Well, how did he put them on?

A. He put them on from the outside.

Mr. Kearney: I object to that as immaterial.

Mr. Curley: Unless this witness can show that he knows of his own personal knowledge, and that this isn't hearsay.

Mr. McFarland:

Q. Well, how about that?

A. This man was on the job putting these things on. I couldn't

exactly swear that I stood over him and looked at him putting them on, but he done the work.

Mr. Curley:

Q. Do you know of your own personal knowledge how he did it?
A. Well, he never crawled inside of them because he couldn't. Those hoppers were filled with ore. He couldn't crawl in.
Q. Did you see him of your own personal knowledge?
A. I saw him working on them.

The Court: Objection overruled.

152 Mr. McFarland:

Q. What was he doing; how was he doing it?
A. Well, he was just working around there. Of course, I never saw him put the angle iron in, but he was on the job.
Q. I know, but what position was he in when you saw him?

Mr. Curley: I object to that because the witness did not see him when he put the angle iron in.
The Court: No, if he says he did not see him put them in, he cannot give his opinion.

Mr. McFarland:

Q. Did you see him at any time when he was discharging his duty in putting on those irons?
A. I saw him when he was working on that furnace doing that work.
Q. What was he doing then; what was he doing when you saw him?
A. Well, that is the work he was doing. He was putting these——
Q. How was he doing it?

Mr. Curley: I object to that. He has already testified that he did not see him when he was putting the angle irons in, that he was on the job.
Mr. McFarland: If the Court please——
Mr. Curley: No, I object to that going to the jury.
Mr. McFarland: I am asking him if he knows. If he knows he certainly has a right to tell it.

Q. You say you saw him when he was doing that?
A. The man done that work because he was employed to do that job. Of course, I never saw him.

The Court:

Q. How do you know? The only reason you know that he did it is the one you have just given?
A. That is the only reason.

The Court: I sustain the objection.
The Witness: I cannot say that I saw the man inside putting the iron in. I cannot say that.

Mr. McFarland:

Q. Was there anything in this hopper at the time that man was placing the angle irons on those hoppers?

A. This man, Morris, was employed on that job fixing up these hoppers, filling up that space, and he done it, and he did not do it from the inside. He done it from the outside.

Mr. Curley: I ask that that be stricken out as not responsive to the question.

The Court: Objection overruled.

Mr. McFarland: That is a question of cross examination.

Q. How do you know?

—. Well, because he couldn't get into the hoppers.

Q. Why?

A. Because that furnace was running.

Q. It was hot?

153 A. It was hot. It was smelting ore at the time and he couldn't get in.

Q. And he fixed it while it was hot; it was fixed up, the holes were covered up?

A. While that furnace was running.

Q. Was it filled up to any extent with anything?

A. Filled up to the top mostly all the time.

Q. With what?

A. With ore.

Q. Now do I understand you to say in that situation that this party put those angle irons on that hopper with that hopper filled up practically to the top with ore?

A. At times, you know. The hopper would not be filled up to the top entirely all the time. They discharged, you see.

Q. Go ahead.

A. They discharged their ore. When they emptied their hoppers a little bit, they dropped it down. When they wanted to work at one hopper they would let the ore go enough into the furnace to let them lie down and take their measurements, cut their angle iron and put it up.

Q. From what position?

A. From kneeling down and looking into the hole.

Q. Now, I understand you to say that one could not get into that hopper under any circumstances at the time he was placing those angle irons on Hopper Number 3?

A. No, the furnace was running, and he could not even if the hopper was empty. It is red-hot from the heat, the gas off the furnace makes these hoppers so hot that a man cannot touch them with his naked hands.

Q. How did he do that?

A. He done that, he leaned over and took his measurements of his angle irons and the end of the——

The Court:

Q. Where did he do that?

A. Off the floor. These bolt on the floor, you see. They bolt up through the floor. The space between the inside of the hopper and the hole they had to go down is ten inches. It is only this distance from here to the hole. It is not like it was so far that a man could not reach his hand in and measure anything.

Mr. McFarland:

Q. Now, you say this opening on the top was twelve by thirty-six?

A. It is twelve inches by thirty-six inches.

Q. Now, how far was it from the opening to the side where these angle irons were being fitted up?

A. One side is ten inches and the other side is eight inches from the edge of the hole.

Q. Now, can the angle irons be fitted from there?

A. If I was doing the job I would fit it that way myself. It is no trouble for a man to reach his hand in ten inches and hold a little angle iron that way up there and put a bolt through the floor. The way I would have done the thing would have been to take the measurements?

Q. Well, now, let me ask you this question: How did you start this thing, by boring holes through the surface of the floor, three holes; how do you do that; how do you start?

A. I don't know what way Mr. Hammer done in the boring of the holes.

Q. How would it be possible to do it?

A. If you want me to tell you how I would do it, I could tell you that.

Q. Well, tell us that.

A. The space where Mr. Hammer went in is twelve inches by twenty-three inches.

154 Q. Thirty-six?

A. By thirty-six inches, twelve inches by thirty-six inches, and the hopper under that is forty-four and three fourths inches by thirty inches broad and thirty inches deep. Now the way, as I understand, Mr. Hammer done that work, he crawled into that, and to put that angle iron on he would have to turn around and lay on his back and take the measurements on holding that angle iron up, which is a very awkward and disagreeable position for a man to be in, compared to the size of the hole and the size of Mr. Hammer. Now, the proper way I would have done that, I would have taken the measurement of the hole, the edge of the hole and the inside measurement of the hopper, which was ten inches. I would have allowed one inch for the thickness of your iron and your bolt, I would have punched these three holes nine inches from the edge of the sheet iron, the holes, and then, I would have put my angle iron up there and marked from the surface. To put the bolts in all you have got to do is sit on the floor with your feet in there and hold the iron up like that, (illustrating) with one hand and put the bolts up through with the other. That is the way I would have done the thing.

Q. Well, is there someone on the top or the surface, if that had been done, to assist in bolting these irons onto the floor?

A. There was the helper.

Juror Moore: Can you hold that angle iron up with one hand?

A. Yes, you could hold that up with one hand or two hands. You see, the helper was assisting you there. That is only twenty-two pounds—hold it up. I think that would have been the most practical way to have done the job.

Mr. McFarland:

Q. Would there have been any danger in placing these angle irons by that method?

A. Any danger?

Q. Yes.

A. Oh, not the only danger is——

Q. I mean to his person, to Mr. Hammer's person.

A. I don't know the danger attached to it any further than—it was not such an awkward position to be in.

Q. So I understand you that there are two methods then by which this thing could have been done.

A. That is the way I would have done it, from the surface.

Q. Do you personally know of anyone having done it in that way?

A. Well, I don't know, the man that finished the hole up where Mr. Hammer was hurt—that was done from the surface, I think, afterwards. Of course, I can't swear to it. I can't say anything about it.

Q. Only just testify to what you know.

A. Yes.

Q. Considering the fact that the broad-gauge track there was being continually traversed by the fettling car, the calcine car——

A. It was traveled by a calcine car.

Q. —calcine car, and the fact that if he had been on the top of the floor instead of in that hopper——

A. Well, if he had been on the top of the floor, of course he would have seen the car coming, and could have got out of the way.

155 —which would you consider the safer way?

A. Oh, on the surface; the way I have just suggested is the safer way.

Q. It would not have been possible, would it, for him to have been burned by this calcine in the manner he was burned if he had been out on the floor?

A. No.

Mr. Curley: I object to it as being a leading question.

The Court: Well, it was answered before the objection was made.

Mr. McFarland:

Q. You don't know about any directions being given to Mr. Hammer as to how he should perform this particular work?

Mr. Curley: Of his own personal knowledge.

A. Nothing only what Mr. Nielson told me that he——

Mr. Curley: Never mind.

Mr. McFarland: Never mind what anybody told you; just what you know yourself.

A. No, no further than that.

Q. Had there ever been an accident on that floor that you know of.

A. Not that I know of.

Mr. Kearney: I object to that as not being material.

The Court: He says not as he knows of.

Mr. Kearney: How does that become material.

The Court: Well, you did not object until after it was answered.

Mr. Kearney: Well, he usually begins before the question is finished.

Mr. McFarland: Well, counsel asked him on cross examination if there——

The Court: I think that is immaterial anyway. I will sustain the objection to it. Now, Mr. Witness, when an objection is made do not answer the question because both sides are entitled to interpose their objection and entitled to a ruling before you answer the question.

Mr. McFarland: You weren't at the smelter the day of the accident?

A. No, I was not at the smelter there. I left about eleven o'clock and went to the old smelter.

Q. Who is smelter foreman now, and superintendent?

A. Mr. Flynn is the superintendent.

Q. Do you know where he is?

A. No, I don't know where he is. He was in California somewhere.

Q. When did he leave there, about the 11th of September?

Mr. Curley: I object to that as immaterial.

156 The Court: Objection overruled.

Mr. Curley: Asking when Mr. Flynn left there?

The Court: Yes.

Mr. McFarland:

Q. Was it about the 11th of September.

The Court: He may show that the witness, any witness, or any persons likely to be called as a witness, or who could have been called as a witness, has left the jurisdiction of the court.

A. It was in September sometime he left. I don't remember when in September he left.

Juror Pacho:

Q. What do you say these cuts are made on the end for?

A. On the end of the hopper there is a three-inch angle iron to stiffen it where the side sheets are riveted to the end, and the space between the top of this angle iron and the top of the floor is two

and one-quarter inches, so that left three-quarters of an inch it overlapped the hopper and extended over it three inches.

Mr. McFarland:

Q. Supposing that angle iron was placed, we will say, a quarter of an inch or half an inch, or a little further, one way or the other——

A. Well, that is the measurement.

Q. —would it make any difference?

A. Yes, it would make no difference, you know, the way it was. You know the ore is not like steam.

Q. Those ends don't have to fit perfectly?

A. No, they don't. It is not a neat job. It is just patching to keep the ore from falling. It is not like keeping in water or air or steam, or anything like that. It is just coarse ore, three-quarters, quarter inch and three-quarters and some times as high as an inch and a half ore is used in those things.

Q. Then they do fit pretty perfect?

A. Not perfect.

Q. Well, would half an inch be out of the way?

A. Yes, half an inch would be out of the way, but an eighth of an inch would not hurt anything.

Q. And the three holes——

A. That is where it is bolted onto the floor.

Q. I understand that. Are they made before it is put in under there?

A. Well, that depends on the man that is doing the work. That depends upon the system the man uses.

Q. Well, what I mean is this: do they have to make those holes in the angle iron before they make them in the floor?

A. Well, now, that is the point, the mechanical part. That is evidently the way Mr. Hammer done—put the holes in there first, and put the angle iron in here and put it up and marked the holes up from underneath.

Q. That is what I want to find out.

A. But I say, drill your holes first through the floor with them air machines, drilling machines—drill the holes in the floor first, and the Mexican helper, all he has got to do is hold the angle iron
157 up there and he can mark his holes from the surface—take the angle iron to the machine shop and drill it and put your bolts in.

Q. Is the floor fixed so that you can do that?

A. Oh, yes.

Q. Drill the holes in the floor first before you do that?

A. Oh, yes, you can drill the holes any time in the floor. The floor is of sheet iron.

Mr. McFarland: Take the witness.

Cross-examination.

By Mr. Kearney:

Q. Don't you know that you can get more correct markings by holding the iron up there and marking off the holes?
A. No, you can't get better marks.
Q. Say, Mr. Fraser, did you serve any time as a boiler-maker?
A. Have I served any time as a boiler-maker?
Q. Yes.
A. No, but I have been working all my life around the shop.
Q. You are very much interested in this case, aren't you?
A. What?
Q. You are very much interested in this case, aren't you?
A. Interested in this case?
Q. Yes sir.
A. Why, aren't you?
Q. I am asking the question, aren't you?
A. Yes, I am, certainly I am.
Q. You gathered up all the witnesses, didn't you and you gave them all money to come down here.
A. No, I didn't gather all the witnesses. You summoned the witnesses first and they come and told me you had summoned them.
Q. Didn't you furnish them the money?
A. I paid the fare. You told them to come to me and get money to pay their fare to come down here.
Q. You gave them the money.
A. What?
Q. Didn't you give them the money?
A. I bought their tickets for them and gave them the money to come down here.
Q. You have been keeping them together since they came down here.
A. I haven't been keeping them together. They go where they please. That is not so.
Q. You think you understand doing this work a whole lot better than Mr. Hammer, don't you?
A. Well, I don't see why I should not, in a general way. When I started the smelter there I had full charge of the repair of the machinery and the keeping it up in order—the old smelter for sixteen years or over. For several years I done every particle of the repair-work myself. It don't require a man to be a boiler-maker for to understand how to do repair-work.
Q. Now, you swear that the way that Mr. Hammer did this work was not the best way?

(Question read.)

A. Yes, I will swear to that.
Q. Do you swear that Mr. Hammer did this work in an incompetent manner?

158 That way is a highly impracticable manner.

Q. Do you swear that the work that he did there was not skilled work?

A. Not steel work?

Q. Yes, sir.

A. No, I won't swear to that. It was steel work.

The Court: Skilled.

The Witness: Steel?

The Court: No, skilled.

The Witness: Skilled work. Oh, yes, yes, it was skilled work.

Mr. Kearney:

Q. You stated awhile ago a man there did something; you swore positively awhile ago that there was a man there that did some of this kind of work and he took the measurements from the outside?

A. He did, yes.

Q. And yet you state that you did not see him.

A. I did not see him put the angle irons in, but he done the job, he done the work.

Q. Say, Mr. Fraser, does it occur to you that you cannot swear positively about anything unless you know it of your own personal knowledge?

A. Well, you don't have to take it if you don't want it. You don't have to take the testimony if you don't want it.

Q. The jury is here to take your testimony, not me.

A. I say that man done the work. He is the man that done the work on that furnace. I did not see him put the angle irons in, but he finished the job, he finished up these holes in the hopper. He closed the opening, and he did not go inside; he couldn't.

Q. Out at this new smelter how many of these angle irons did you put on yourself?

A. I didn't put on any myself at all.

Q. Did they have any of these hoppers like that at the old smelter?

A. No, not the same size as that, but they had lots of hoppers in there, different shapes and form.

Q. They had different hoppers altogether?

A. Yes, altogether.

Q. So that these particular hoppers that were out there at the new smelter, you never had any experience with those until the new smelter was put up?

A. A man don't have to have any experience for it. His ideas, his particular knowledge, will show what is required. It don't make any difference what kind of hopper it is, if he is a mechanic, he knows what is required.

Q. So then you state to this jury that one hasn't got to have any experience in that particular line at all.

A. What do you say?

Q. It isn't necessary for a person to have any particular experience in one line, or any line, as long as he is a mechanic.

A. I say a man, even if he is not a boiler-maker, or he didn't

ever serve a trade, if he had good practical ideas, he can go
159 and fix a thing, even if he is not a mechanic in that trade.

Q. Do you claim to have good practical ideas, Mr. Fraser?

A. I think I have,—just about on an average, I think.

Q. What is the name of this engineer you dictated this map to?

A. The map was sent to me from the Engineers, Horton & Jones.

Q. This map was sent to you. When did you get it?

A. Last night.

Q. This is the one you have been talking about there, penciled off?

A. This? That was yesterday. I think, or the day before yesterday. I am not sure—the day before yesterday.

Q. Did you have any of those blue-prints then with you?

A. No, no blue-prints at all. I had a piece of paper and sketched it off.

Q. What is his name, the engineer that made it here?

A. Well, I don't know his name, but I can tell you where his place is. His place is right across the street from the postoffice, the opposite side of the street from the postoffice, next door to the restaurant, I think they call him Hastings or Hoskins.

Juror Myer: Jaasted.

The Witness: Jaasted, that is it. Now, it was his man in there.

Mr. Kearney:

Q. Did Jaasted do that or somebody else?

A. He done it. Well, the man at the desk done it. I don't know whether they call him Jaasted or not. I couldn't say—the young man that is at the drawing table there.

Q. And you consider your skill far superior to Mr. Hammer's don't you?

A. No, I don't consider myself far superior at all, but I have got as good ideas in fixing things, probably, as Mr. Hammer has.

Q. You would like to fix this case?

A. No, I don't want to fix it. I am here to give my testimony. I will give the honest truth, and I won't swear to nothing that is a falsehood at all. I want to explain things as it is.

The Court: This line of questioning you will not be permitted to pursue any further.

Mr. Kearney: I beg your pardon.

The Court: Those sort of questions will not be permitted any further.

Mr. Kearney:

Q. You say that this man put those angle irons on there, on those hoppers when they were red hot?

A. I say the hopper was hot that he couldn't—almost red-hot; that he couldn't go into the Number Three furnace, that the angle irons was put on from the surface while the furnace was running.

Q. Those irons then extend up only about thirty inches?
160 If it has a red-hot bottom, wouldn't the heat extend from the bottom?

A. They are not red-hot at the bottom at all. They are so hot you cannot put your naked hand upon them. They are not red-hot, but the smelting furnace is only something like, the roof of it, three feet below the bottom of these hoppers, and no man can stand in there on top of this roof but a very short time.

Q. What is to prevent the heat then from coming up on the side of those hoppers?

A. The hopper is entirely clear.

Q. To where you would have to put those angle irons in.

A. The hopper sets three feet over the top of it, and is independent of the roof of the furnace altogether. Outside of the fettling pipe which goes down through.

Q. Didn't you say that when they were putting those angle irons in, that those hoppers had calcine in them?

A. No, I didn't.

Q. You said they had been running calcine into them.

A. Not, those hoppers, no.

Q. Well, the hopper in which you say—that you know that he fixed.

A. Oh, yes.

Q. Now, not the one Mr. Hammer was fixing; but the one this person, you say you know he fixed it from the outside.

A. I don't think I said calcine. I said ore, crushed ore from three-eight-s to three-quarters and sometimes one inch and a half was put in these hoppers.

Q. Was that one hot?

A. It gets hot from the heat off of the furnace.

A. The furnace underneath kept it hot?

A. What?

Q. The furnace underneath kept it hot?

A. Yes, the furnace underneath keeps it hot. It is impossible for a man to go in there and put an angle iron on there, or any other kind of a piece of iron. He can't touch the hopper with his naked hand.

Q. Now, you weren't present when Mr. Hammer was burned, were you?

A. What is that?

Q. You weren't present when Mr. Hammer was burned, were you?

A. No, I wasn't present at that time. I left the new smelter about eleven o'clock and went to the old smelter.

Q. You said awhile ago that you knew the hopper he was burned in.

A. I do know the hopper he was burned in.

Q. And you said awhile ago that he was burned in a certain hopper. Isn't it a fact that you got that information afterwards?

A. I saw the hopper. I came back about two o'clock. I walked back there about two o'clock after I was through at the old smelter, and Mr. Hammer had been taken to the hospital, and I went down and went in and looked at it, measured the distance right there at that time.

Q. You didn't see him burned?

A. No, I didn't see him burned at all, I went to the hospital and inquired for him two days after, or the second day after he was burned.

Mr. Kearney: That is all.

Redirect examination.

By Mr. McFarland:

161 Q. Do I understand you that this hopper in which Mr. Hammer was injured was not fed by the calcine motor?

A. It was empty, that hopper was. That furnace was shut down. That furnace was shut down—not in operation at all.

Q. Oh, shut down; it wasn't in operation?

A. No.

Q. Well, you say that hopper is fed by ore, is that right?

A. Well, yes, that hopper is fed by the ore from the twenty-inch track.

Q. Do you pour that calcine into the same hopper?

A. There wasn't poured anything in it.

Q. Where did you put the calcine in?

—. Well, that is probably on the other furnace.

Q. On another furnace?

A. Yes, on the Number 3 furnace. They are now, or was before they shut down, using the calcine in these hoppers.

Q. So they use both calcine——

A. Yes, they are now.

Q. —and ore?

A. But at that time they were using the ore.

Q. At the time that Mr. Hammer was injured what did they feed these hoppers with?

A. Well, they fed them with ore, slag.

Q. Ore and slag?

A. The number 3 furnace.

Q. Did they pour calcine in that furnace?

A. Well, sometimes they done it. When they wanted calcine, according to the flux on the Number 3 furnace. Whenever they wanted—if they wanted calcine, they probably used a little of it. I am not familiar with the charging, as I have nothing to do in regards to the operation of the furnaces.

Mr. McFarland: That is all.

The Court:

Q. Well, at the time that those angle bars were put in these other hoppers, what was being put into those hoppers, the ore or the calcine?

A. Well, there was ore and slag, and I think probably there was some calcine. I am not sure of it. I wouldn't like to swear to the calcine, but I know there was ore and slag put into them at that time.

Q. And these angle bars were put in those hoppers between times?

A. Right at the time whenever the repair-man wanted to fix one, they would drop the ore down a little bit, enough for to let him reach in to take his measurements, and put his angle irons on.

The Court: That is all.

Mr. McFarland:

Q. That furnace under the particular hopper that Mr. Hammer was injured in was not in operation that day?
A. No, it had been shut down.
Q. It was what they call "dead"?
A. Dead furnace, yes.

Mr. McFarland: That is all, I think.
(Witness excused.)

162 MAURO PROVENCIO called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. Give you- name to the Reporter. Tell him your name.
A. Mauro Provencio. I want an interpreter.

Mr. Kearney: No, this fellow writes and reads English well.
Mr. McFarland: Yes, born and raised in this country.
Mr. Curley: We want to talk to him in English.

The Court: Well, we will try you in English.
The Witness: Well, I can't talk in English and I have never been before in this court business. I can't explain.
The Court: What did you say?
The Witness: Well, I say, I can't—I have never been in this court business; I can't explain.
The Court: Well, there are lots of people that never had any court business, and I wish there were a great many more, but that isn't the question. Now, if you don't understand any question that comes up, you let me know, and I will have an interpreter for you. But as long as you can understand the questions that are asked you, you may answer them in English. And I shall ask counsel on both sides to ask short questions—as many of them as you please, but short. If you cannot answer them in English, you let me know, and I will try to save you any embarrassment. It takes just twice as long to examine through an interpreter. Now, if you desire you may sit closer to this witness.

Mr. McFarland:

Q. Where do you live?
A. Clifton.
Q. How long have you lived in Clifton?
A. Oh, for about eight or ten years.

Q. Where were you born?
A. In El Paso, Texas.
Q. What is your business?
A. Laborer.
Q. Were you at work on the feed-floor——
A. Yes sir.
Q. Just wait until I get my question finished, then you can answer it. Were you at work on the feed-floor of the smelter at Clifton on or about the 28th day of December, of this year?
A. Yes sir.
Q. Will be a year this coming December. What were you doing.
A. I was fixing the feed-floor.
Q. Fixing what?
A. Feed-floor.
Q. And what was you- particular duty on that feed-floor, if there was any duty that you were discharging?
Mr. McFarland: If your Honor please, I will withdraw that question.
Q. What were you doing up on the feed-floor at that date?
A. Just putting an angle iron in the hoppers.
163 Q. You were helping Mr. Hammer, you say?
A. Yes, sir.
Q. Doing what?
A. Putting in angle iron.
Q. Do you remember the time Mr. Hammer was hurt?
A. Yes sir.
Q. You know about the time of day?
A. Yes sir.
Q. What time of day was it, if you remember, before noon or afternoon?
A. Oh, afternoon.
Q. After twelve o'clock?
A. Yes sir.
Q. About what time after twelve?
A. Oh, it was about two o'clock.
Q. Did you see a calcine car come up onto the feed-floor about that time?
A. Yes sir.
Q. Who had charge of that car?
A. Estanislado Provencio.
Q. You know the hopper that Mr. Hammer was in, didn't you, fixing?
A. Yes sir.
Q. How far did that car—or did that car stop at that time before it reached the hopper in which Mr. Hammer was at work? Did it come to a stop?
A. How?
Q. Did it come to a stop?
A. About——
Q. Did it, first, yes or no.
A. Yes, he stopped.

Q. About how far was it from the hopper when the car stopped?
A. About twenty or twenty-five foot.
Q. Who stopped it?
A. The motorman.
Q. The motorman or the man that had charge of it?
A. Yes sir.
Q. Well, when he stopped at about twenty or twenty-five feet from the hopper at which Mr. Hammer was at work, what did you do, if anything?
A. Why, I told Mr. Hammer that the motor was coming the way we were working.
Q. Did you tell him anything else? Told him that the car was coming?
A. Yes sir.
Q. Where were you when the car stopped?
A. I was in the middle of the track.
Q. Middle of the track that the car was coming on?
A. Yes sir.
Q. Now, what did you do when the car stopped? Just state to the jury here what you did and what you said, and how you said it.
A. When the car stopped I tell Mr. Hammer the car coming over, and I tell him to get out.
Q. Did you go up to the hopper that he was in?
A. No, sir.
Q. How far were you from the hopper at that time?
A. From the hopper? Oh, just close to the hopper.
Q. Right by it?
A. Yes sir.
Q. What did you say to Mr. Hammer?
A. To get out.
Q. Get out?
A. Yes sir.
Q. Now, do I understand you that you told him that the car was coming, or had come? What did you say now exactly; what did you say to him first, so that the jury can fully understand it. That is what I am after. You say you were standing in the middle of the track when the car came up and stopped?
A. Yes sir.
Q. And you were standing by the hopper that Mr. Hammer was in?
A. No, I never standing——
Q. Well, where were you?
A. I was in the middle of the track.
Q. How far from Mr. Hammer?
A. Oh, just close to the hopper.
164 Q. One, two, three or four feet?
A. Oh, about a foot, I guess.
Q. A foot?
A. Yes.

Q. One foot from the hopper?
A. Yes.
Q. Now, where was Mr. Hammer at that time?
A. He was in the hopper.
Q. Was his body and his head entirely—was it out of sight?
A. No sir.
Q. What part could you see?
A. Well (indicating).
Q. See him?
A. Yes.
Q. Was his head up to the top of the floor?
A. No sir.
Q. How far did it lack from being up to the top of the floor?
A. Just——
Q. One inch or two inches, or three inches, or what—a foot, three inches or what?
A. No sir.
Q. Can you tell the jury approximately the distance? Tell the jury about how far his head was from the top of the feed-floor.
A. No, he never showed his body on top of that.
Q. What?
A. No, he never showed his body on top of that hopper.
Q. His head was up?
A. No, it is was down.
Q. How far?
A. About two or three inches, I guess.
Q. What?
A. About two or three inches, I guess.
Q. I understand you now, the first thing you said you told him that the car had come. Did you tell him anything about the car stopping?
A. What?
Q. Did you tell him that the car was there and stopping?
A. No, sir, I never told him.
Q. What did you say to him then, that the car had come?
A. Yes sir.
Q. Then what did you tell him after than?
A. What?
Q. What did you say after you told him that the car had come?
A. After the car come?
Q. Yes.
A. Well, I told him to get out.
Q. What did he say?
A. He didn't want to.

The Court:

Q. What?
A. I told him two or three times.

Mr. McFarland:

Q. What two or three times?

A. Told him to get out.
Q. You told him that?
A. Yes sir.
Q. Well, then, what did you say?
A. No sir. Nobody what——
Q. Did he say anything when you told him to get out two or three times?
A. He don't want to get out.
Q. He said he didn't want to?
A. Yes sir; he get mad about it. He says, "That fellow is—"Well," he says, "That fellow is coming over and don't let a man work," and he get mad about it.
Q. Who did he mean, the motorman of the car?
A. What?
Q. You said he got mad about the car coming. I want you to tell the jury what he said.

The Court: I think the reporter got what he said.
(Answer read.)

Mr. McFarland:

165 Q. Well, now, was it your duty to signal this car to come whenever you wanted it to come?

Mr. Curley: I object to that as calling for a conclusion.
The Court: I don't know, if he is employed in a certain line of work——
Mr. Curley: Well, we are willing that he show if he received any particular instructions. Now when he says, "was it your duty," he might have drawn an erroneous conclusion from his instructions.

Mr. McFarland:

Q. Was it your duty when the car approached the point where Mr. Hammer was working——

The Court: That is the question they objected to. They don't object to your showing what he was instructed to do.
Mr. McFarland: I will withdraw that.

Q. What were you to do up there on top of that feed-floor?
A. What did I do?
Q. Yes, why did you stand up there?
A. Well, I stand there to work and watch that car.
Q. Is that what you were hired for, and up there to watch that car?
A. Yes sir.
Q. Is that what you say you were doing that day?
A. When the car come—I can't understand it, you had better put an interpreter. I can't understand it good.
Q. I think we are getting along pretty well. Did Mr. Hammer say anything to you about the car coming on toward the point where he was?

Mr. Kearney: I object to that as leading. I object to putting in the witness's mouth what he wants him to testify.

Mr. McFarland: No, I didn't put it in his mouth. I asked if Mr. Hammer said anything about coming on or stopping the car. That is calling his attention to it in order to save time.

The Court: I am inclined to think that this witness had better have an interpreter, and let him tell all that took place.

(The testimony from this point was elicited through an interpreter.)

Now ask the general question and let him go ahead and tell all that took place here at that time.

Mr. McFarland: From the beginning, your Honor, or from where he left off.

The Court: From where he left off.

Mr. McFarland:

Q. Well, what did you do or say, or what did Mr. Hammer do or say after you notified him that the car was there, or was coming, or whatever you did say about the car?

166 A. I told him that the car was approaching.

Q. Did the car stop?

A. It did.

Q. You previously testified about twenty-five feet from him.

Mr. Curley: I object to that as repetition.

Mr. McFarland:

Q. All right. Did the car stop?

A. Yes.

The Court: He has answered that and he has given the distance.

Mr. McFarland:

Q. Then what, if anything, did you say to Mr. Hammer?

A. When the car stopped?

Q. Yes.

A. I told him that the car was waiting there to proceed, go across, or to go ahead.

Q. What do you mean by going across?

A. To go across to the other side where there was a deposit of some metals, and I don't know their names—slag or something like that.

Q. Do I understand you to say that you told Mr. Hammer that the car was waiting for him to get out of the hopper, to go across to some other point?

Mr. Kearney: I object to that question.

Mr. McFarland: I don't understand it, if you- Honor please, and I don't think this jury do.

The Court: Well, it seems to me it is very plain:

Mr. McFarland:

Q. Was that all he said?
A. Yes sir.
Q. Did you tell him to get out of the hopper?

Mr. Kearney: I object to that as a leading question.
The Court: Objection sustained.

Mr. McFarland:

Q. What did you say to him.

The Court: The object in bringing this interpreter forward was to allow him to answer the questions in his own way, without having to answer so many questions.

Mr. McFarland: I cannot understand what he was waiting for the car to proceed for, that the car was out there waiting to proceed.

The Court: Waiting for Mr. Hammer to get out of the hopper so that it could go over to the other side, is what he said.

A. Yes sir.

Mr. McFarland:

Q. Well, did he get out?
A. No sir.

Mr. McFarlanr:

Q. What did he say?
A. That he would remain inside.
Q. He would remain inside. Did he say anything to you about having the car come on?

Mr. Kearney: I object to that as a leading question.
167 The Court: Objection sustained.

Mr. McFarland: Did he say anything further?
A. No sir.
Q. Well, after he said that he wouldn't come out of the hopper, did you say anything further to him?
A. After I told him two or three times, after he told me two or three times that he wouldn't come out, then I jumped to the other side of the track and gave the motorman a signal to come on.
Q. Was there anything said by Mr. Hammer or by you at that time — reference to this car coming on?

Mr. Curley: Objected to as leading.
Mr. McFarland: I want to identify it as far as I can, to save time.
Mr. Curley: He has already gone over that.
The Court: I thought you had passed over that point and gotten to the point where the car *has* gone over. I thought he testified to that in English.
Mr. McFarland: Well, I was going to get that in the way indicated by your Honor.

The Court: Well, I did not mean to go over the whole thing again.

Mr. McFarland:

Q. Did the car start from where it stopped?
A. When I made a motion it did.
Q. Did it go over that hopper?
A. Yes sir.
Q. And what occurred then?
A. When it passed by him, by the hole, the calcine fell on him.
Q. Now, when Mr. Hammer said to you that he wouldn't come out of the hopper, did I understand you to say that he got back into it so you couldn't see him at all?

Mr. Kearney: I object to that as a leading question. He didn't ask him a question.
The Court: I will permit that question. Read the question.
(Question read.)

A. Yes he stooped down.

Mr. McFarland:

Q. Was it before or after he got down into the hopper the last time that he told you to tell the motorman to come on?

Mr. Curley: I object to that.
Mr. Kearney: It is leading and suggestive.
Mr. Curley: And the witness did not testify that he told the motorman to come. There is no such testimony as that.

168 Mr. McFarland:

Q. Did Mr. Hammer tell you to give the sign for him to come on?

Mr. Curley: I object to that question now.
The Court: Wait just a moment. The questions are coming so fast here now. In the first place, you withdraw the question that the objection was made to, do you not, or do you ask another one without withdrawing it? I did not understand you. You asked a question and an objection was made. Now before I had a chance to rule on it you asked another question. Did you withdraw the previous question?
Mr. McFarland: Yes sir.
The Court: What is the last question?
(Question read.)
Mr. Curley: That is objected to as leading and suggestive. He has asked him what else was said, what else did Mr. Hammer say, and the witness has said nothing; that Mr. Hammer said he had gotten tired of him running over there and that he wouldn't let him work.
The Court: He is not asking him to repeat that.
Mr. Curley: Then he asked him what else was said, and the witness said "nothing."
The Court: Yes, I understand, but apparently one or the other

of us don't understand the question. I do not understand it that way. As I understand it, he is now asking him to state whether or not he gave the sign for the man to come forward before or after Mr. Hammer made the statement that he wasn't going to get out.

Mr. Curley: I understood the question to be whether Mr. Hammer told him to make a signal for the man to come on.

The Court: I will sustain the objection because there was no testimony that he told him to come on.

Mr. McFarland:

Q. Did Mr. Hammer at any time tell you, or give you a signal, indicating that he wanted the car to proceed on its journey over the hopper in which he was at work?

Mr. Kearney: I object to that as leading and suggestive.

Mr. McFarland: If your Honor please, there is a difference between witnesses and parties. That might be an admission against interests—did he do it or did he not. He can say whether he did or not. If he were a party that would not be competent, but I ask him what this party said, or did he do it.

Mr. Curley: It is placing right in the witness's mouth the answer.

169 The Court: I will sustain the objection to it as too leading, and I will permit you to ask the witness whether or not he made any statement to the witness with reference to the car.

Mr. McFarland: Coming on?

The Court: Yes, coming on or going in.

Mr. McFarland:

Q. You know Mr. Hammer?

A. Yes, sir, I do.

Q. Did he make any statement or sign to you whereby he indicated that the car should proceed on to its destination and over the hopper in which he was?

Mr. Kearney: I object to that.

Mr. Curley: I think that is still leading.

Mr. McFarland: I think the question the court asked was perfectly proper, and I attempted to follow it as nearly as I could.

The Court: I think you repeated substantially your former question. I think I suggested that it would be proper to ask the witness to state whether or not Mr. Hammer said anything with reference to the car approaching or passing over the place, and if so, what it was.

Mr. McFarland: After it stopped?

The Court: Yes, and if so, to state what it was. Understand, I am not putting the question to the witness.

Mr. McFarland: I am putting it as counsel, if the Court please.

Mr. Curley: Speak up so that the jury can hear you?

A. Yes, he told me when he didn't want to come out of the hole.

Mr. McFarland:

Q. What did he say?

A. He told me that he would stay there, and for me to jump across the track and give the motorman a signal to come.

Q. Was the car standing still at that time?

A. When he told me to give the signal?

Q. Yes.

A. Yes, he was stopping.

Q. The car was stopping. Was there any other person present at that time except yourself, Mr. Hammer and the man who had charge of the calcine car?

A. Gustavo Provencio was working around there pushing a car, a hand-car.

Q. Pushing a hand-car?

A. A small ore car that runs on a narrow-gauge track.

Q. Anyone else that you saw or know that was around there?

A. No one else.

Q. What did you do, if anything, immediately after the calcine flowed onto Mr. Hammer.

170 A. Then he stood up straight in the place where he was working, and then I came there to help him.

Q. You came to him?

A. Yes sir.

Q. What did you do when you got there to him?

A. I just helped him to get out of the hole.

Q. Anything else?

—. Then I took him a little farther out to help put the fire out.

Q. Did he help too?

A. Yes sir.

Q. Do you know Mr. Bentley?

A. Yes sir.

Q. Did you see him there?

A. I saw him after the accident and after we had taken Mr. Hammer out. They were working down below and they come up.

Q. Now tell the jury just who the people were that helped Mr. Hammer out of the hopper.

A. I was the only one. There was no one else.

Q. Did anybody afterwards come and help him?

A. After I had taken him out others come in.

Mr. McFarland: That is all. Take the witness.

Cross-examination.

By Mr. Kearney:

Q. Since this injury to Hammer where have you been?

A. In Clifton.

Q. The company never laid you off at any time, did it?

A. No sir.

Q. You worked on up to the 11th of September, the strike didn't you, and then you quit and left for Duncan?

A. No sir.

Q. Didn't you go to Duncan?
A. Before this strike I went to El Paso, Texas.
Q. What?
A. Before the strike, I went to El Paso, Texas.
Q. And you came back to Duncan, didn't you?
A. About two months afterwards I returned to Duncan, that is where I am now.
Q. And there the company is taking care of you, isn't it, furnishing your provisions? I mean the defendant here.
A. No sir.
Q. They don't furnish you any provisions at all?
A. No sir.
Q. After Mr. Hammer got injured didn't they promise to give you a better job?
A. No sir.
Q. Didn't they promise to give you a better job at all?
A. Before the accident I spoke to the foreman and I asked him to give me a better job, because I was not earning enough salary.
Q. Whose signature is this? (Handing paper to witness.)
A. It is mine.
Q. Don't you say in that letter that they promised to give you a better job and pay you more money?
A. Before the accident when I spoke to the foreman, and they didn't give me any better job before or after.
Q. Is this your handwriting?
A. Part of that is mine. This is my wife's handwriting and part of that is mine.
Q. Did you dictate that to her?
A. Yes sir.
Q. What does that say, the last part of that?

171 Mr. McFarland: If the Court please, I object to reading extracts from a letter. If it is important, it should be read in its entirety—not just pick out a sentence and read it.

The Court: Isn't it the entire letter he is asking about?
Mr. McFarland: No, he says, "what is that right there."
Mr. Kearney: He dictated it and I asked him to read it.
The Court: Well, if you want to object to it, you had better look and see what it is, and point out your objection.
Mr. McFarland: I would like to see it, your Honor, I have had no opportunity to look at it.
The Court: Counsel will no doubt submit it to you.

Mr. Kearney:

Q. You dictated this letter, didn't you?
A. Yes, I dictated it to my wife, and she wrote it, and I wrote another letter.
Q. This is your signature here to this letter?
A. Yes, that is my signature.

Mr. Kearney: We will ask that this be marked Plaintiff's Exhibit F for identification.

The Court: It may be marked.

Mr. McFarland: I have no objection to it, if your Honor please. We don't think it is pertinent.

The Court: Well, they haven't introduced it yet. As I understand it, they had it marked for identification.

Mr. Kearney: Now, we will offer it in evidence.

Mr. McFarland: No objection.

The Court: It may be marked.

(Paper marked Plaintiff's Exhibit F.)

The Court: You may read it.

(Counsel reads Plaintiff's Exhibit F to jury.)

Mr. Kearney:

Q. If the bottom valve in this car had been closed there was no danger in that car going over the hopper, was there?

A. I couldn't tell. I wasn't handling that.

Q. You don't know whether there was any danger about that car or not, do you?

A. How is that?

Q. You don't know whether there is any danger about handling that car or not.

A. To one who knows nothing about it, I think it is.

Q. You don't know anything about it then, do you?

A. No, I don't know anything about it because I never handle that car.

172 Q. How long were you about the smelter there?

A. I worked there about four or five years.

Q. Most every day did you see that car during that time?

A. Yes, the time I was working there, I saw the car.

Q. Did you ever see any red-hot silts in that car?

A. No sir.

Q. Did you ever see them pull the slide door at the bottom and the hot calcine run out?

A. No sir.

Q. You never at any time knew of calcine coming out of that car, did you?

A. No sir.

Q. And on this particular occasion you didn't see any calcine, did you, come out of that car, or know that it come out?

A. When it passed by the hole and fell on Mr. Hammer, I saw it.

Q. What?

A. When it passed by the hole on this occasion and fell on Mr. Hammer, I saw it.

Q. That is the first time you ever saw any hot calcine, isn't it?

A. Yes sir.

Q. Although you worked about that smelter about five or six years? And you saw that car most every day?

A. Yes sir.

Q. And that is the first time that you ever saw any hot calcine?

A. Yes sir.

Q. Did you ever see this car come down to those hoppers and discharge this calcine?

A. In that one where we were working, I have not.

Q. No, in the others?

A. In the others I could see the calcine in the deposits.

Q. Then you have frequently seen, or many times seen this car bring calcine to the other hoppers and dump it in them?

A. And the one that was running, I could see it come in.

Q. You saw it there didn't you?

A. I saw it several times.

Q. Well, you saw them dumping the hot calcine there, didn't you?

A. I could see it standing there probably unloading.

Q. Yes sir; you saw them unloading. Did you ever see this car at any time before spill calcine at a hopper or place that they did not intend for it to be emptied?

A. No sir.

Q. Did you ever tell anybody what you would or could testify to if called as a witness in this case?

A. No sir.

Q. Or knew about the case?

A. No sir.

Q. You never before told anyone what knew about this case?

A. No sir.

Q. After this accident happened didn't you go down and give Mr. Flynn a statement of what you saw and knew about it?

A. Yes sir, I did.

Q. Was that statement in writing?

A. Yes, I think it is, because they took my testimony there.

Q. And you signed it, didn't you?

A. No, I haven't signed it.

Q. You didn't sign it. They had a stenographer there and took down your testimony, didn't they?

A. Yes sir.

Q. Then they told you you would have a job right along didn't they?

A. No sir.

173 Q. Then they didn't promise to give you a better job and more wages?

A. No sir.

Q. That statement in the letter I just read then is untrue, is it?

A. It is. As I told you, that I spoke to the foreman before this accident that I wasn't receiving enough salary.

Q. Coming down on the train from Lordsburg to Tucson, didn't you talk to me about this case?

A. You spoke to me. I didn't speak to you.

Q. Didn't you talk to me?

A. Yes sir.

Q. And didn't you tell me that after the accident they promised you a better job?

A. I did not.

Q. You didn't make any such statement at all to me on the train, did you?

A. Yes, I did.

Q. Immediately following the injury to Mr. Hammer didn't Mr. Bentley say to you, "What is the matter with the fellow, (referring to the motorman) that he didn't stop the car?" Did not you then say to Mr. Bentley, "The brakes wouldn't work, the fellow said on the motor car," or words to that effect?

A. No sir.

Q. There was no such conversation or statement made or had immediately after the injury to Mr. Hammer, was there?

A. No sir.

Q. Nothing said at all about the injuries to Mr. Hammer, was there. There was nothing at all said about the injury to Mr. Hammer?

A. Some of them remained there talking perhaps, and I left to help take Mr. Hammer to the hospital.

Q. But you didn't hear anybody say anything at all, did you?

A. No sir.

Q. As soon as the car went over, they took Mr. Hammer out of the hopper, and nobody said anything, did they?

A. After the accident some of them got around and begin to talk how the accident happened?

Q. That was after they took Mr. Hammer out of the hopper, was it?

A. Yes sir.

Q. How long after?

A. Oh, about five or ten minutes.

Q. Did you see Mr. Bentley there at all?

A. Yes sir.

Q. Mr. Bentley was there and helped take Mr. Hammer out of the hopper?

A. No sir.

Q. Who were there that helped take him out of the hopper then?

A. I alone helped him to get out.

Q. Alone, eh? Nobody else?

A. No sir, nobody else.

Q. Nobody else came near him, did they?

A. Nobody else came until I had him on one side. Then the other men came in.

Q. Do you know this fellow that was driving the motor, or pulling the motor down? He is a relative of yours, isn't he?

A. Yes sir, I do.

Q. What relation is he to you?

A. He is first cousin.

Q. Don't you know, as a matter of fact, that he never did stop that car at any time; that he kept on going, and that you were requested there to give the signal to stop, and instead of doing that you gave the signal to come on?

A. No, he all the time saw, when we were working there—when

he saw us working there he would stop. He would work—he would stop just back of where we were working.

Q. I didn't ask you about other times; I asked you about this time.

A. If he stopped there?

174 Q. No, I am asking you if you did not motion for him to come on?

A. I did not give him any signal until Mr. Hammer told me to do so.

Q. No, I am asking you if you didn't motion for the motorman to come on.

A. No sir.

Q. You didn't motion for the motorman to go on at any time, did you?

A. After Mr. Hammer told me to jump across the track, I did.

Q. Did you give the motorman a signal to stop at any time just before Hammer was injured?

A. No sir.

Mr. Kearney: That is all.

The Court: Anything on re-direct examination?

Redirect examination.

By Mr. McFarland:

Q. You say you wrote that letter?

A. My wife wrote it.

Q. Did you dictate to her what to write?

A. Yes sir.

Q. Now what do you mean in this letter when you say that "Mr. Fraser wrote you a letter and told you to ask for expenses," expenses where?

A. Mr. Fraser wrote me a letter to go to their camp there in Duncan and speak to someone there whose name I don't know, to talk to him and to tell him—to talk to him in regard to my expenses of coming over here.

Q. To Tucson?

A. Yes sir.

Q. And what do you mean in this letter when you said if this money was not given you that you wouldn't go? Why was it that you wouldn't go?

A. Because I had nothing to leave there to my wife.

Q. Did you have any money on your own account to come?

A. Because I had nothing to leave there to my wife, *because I had nothing to leave there to my wife.* At the camp they only offered me the provisions.

Q. Did you have any money to come yourself to pay your own expenses?

A. To come here, no.

Q. Well, Mr. Fraser did give you some money to give to your wife, while you were gone?

A. No sir.
Q. Didn't give you any money at all?
A. No sir.
Q. Is your wife being taken care of there at the camp? Is she at the camp at Duncan?
A. Yes, she remained there at my father-in-law's.
Q. Well, don't you remember that Mr. Fraser gave you some money to take care of your wife while you were gone.
A. No sir.
Q. He didn't pay you any money at all?
A. No sir.
Q. Only brought you over here and is paying your expenses now?
A. Paying my expenses, and he told me he would pay me $3 a day.
Q. While you were here?
A. Yes sir.

Mr. McFarland: That is all.
(Witness excused.)

175 GUSTAVO PROVENCIO called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What is your name?
A. Gustavo Provencio.
Q. Where do you live?
A. Clifton, Arizona.
Q. How long have you lived there?
A. I have been there ever since I was born, for all my life.
Q. Were you born there?
A. Yes sir.
Q. Born in Clifton. Were you there on the 28th day of December?
A. Yes sir.
Q. 1914?
A. Yes sir.
Q. What were you doing then?
A. I was on a fettling car that day.
Q. A fettling car?
A. Yes sir.
Q. Well, now, will you explain to this jury what a fettling car is?
A. Yes sir; it is a little car about four foot long, two foot and a half wide. It carries some kind of ore and slag on it, you know—a couple of wheels on the bottom.
Q. To do what with?
A. What?
Q. What is it used for, to carry ore and slag?
A. To carry ore and slag; yes sir.

Q. Where to?
A. To the furnaces and the hoppers.
Q. Were you engaged in that business on the day Mr. Hammer was injured, burned?
A. Yes sir; I was there.
Q. Was it your duty to be on that floor at that time?
A. No sir, it was not my duty. It was my duty to run the car on that day. I had my job done, you know, and I had a broom sweeping the floors there.
Q. Were you operating this little car that day?
A. No, not at the time of the accident.
Q. You say you were on top of the feed-floor?
A. Yes, sir; on top of the feed floor.
Q. What were you doing up there?
A. Sweeping the floor, sweeping the sides of the tracks.
Q. Sweeping?
A. Yes sir.
Q. Did you see the calcine car come up onto the floor, feed-floor, on that day about two o'clock?
A. Yes sir, I saw it.
Q. Where were you then?
A. I was on one side about ten feet distant from that hopper there.
Q. You were about ten feet from the hopper?
A. Yes sir.
Q. What hopper?
A. From the hopper that Mr. Hammer was injured in.
Q. And did that car come straight along from the time it entered the feed floor until it got to the hopper where Mr. Hammer was?
A. No sir the car stopped about twenty or twenty-five feet distant before the hopper, you know.
Q. Now, how long did that car stay there?
A. About five or ten minutes, I guess.
Q. Did you see this last witness Mauro Provencio?
A. Yes sir, I saw him.
Q. Where was he?
A. He was on one side of the hopper there.
176 Q. Was anyone else on that feed-floor in that immediate neighborhood then?
A. Nobody else but Mr. Hammer and the helper and the motorman and myself.
Q. Three of you?
A. Four of us.
Q. Four of you including Mr. Hammer?
A. Yes sir.
Q. Now, what if anything, did the helper do when the car stopped?
A. I heard the helper speak to Mr. Hammer in there, but I couldn't hear what he said on account of the noises.
Q. He spoke to Mr. Hammer?
A. Yes sir.

Q. How far were you from Mr. Hammer at that time?
A. About ten feet at that time.
Q. Ten feet?
A. Yes sir.
Q. Could you see Mr. Hammer?
A. I could see his head; that is all.
Q. Was it up level?
A. Yes sir, it was level right there.
Q. Level with the top of the feed-floor?
A. On top of the feed-floor on the same floor.
Q. You didn't hear what he said?
A. I didn't hear what he said, I saw him speak.
Q. What did the helper do after he spoke to him?
A. He got out of one side of the track and gave the motorman the signal to come ahead.
Q. What did Mr. Hammer do at that time, if anything, after the helper gave the signal to come on?
A. He got in the hole, was sticking in the hole.
Q. What did he say?
A. Not right after, he didn't say anything after.
Q. Did you see him do anything?
A. No sir, just when he was talking to his helper.
Q. What did he say or do?
A. Oh, he just made a sign with his hand like that (indicating). I couldn't hear what he said.
Q. Mr. Hammer did?
A. Yes sir.
Q. And then after he made that sign, what did the helper do, if anything?
A. The helper jumped out on one side of the track, and gave the signal to the motorman to come ahead on the same side.
Q. Same signal?
A. Yes sir.
Q. How was the car going after it stopped, in respect to speed? How was it moving?
A. It was running easy.
Q. How?
A. The car was running easy. It wasn't running very fast.
Q. How?
A. The car was running easy at that time.
Q. Easy?
A. Yes.
Q. Well, I mean fast or slow?
A. Slow.
Q. Now, what did I understand you to say that Mr. Hammer did after the helper saw — talking to him there?
A. After the helper jumped Mr. Hammer got into the hole like this, (indicating) you know, sticking in the hole.
Q. So you couldn't see his head?
A. Yes.

Q. Who was the first one that got to Mr. Hammer, so far as you know, after he had been scalded in this calcine?

A. The first one that I saw was his helper.

Q. What did his helper do?

A. He pulled him out of the hole, helped him out of the hole, helped him to come out, you see.

177 Q. Pulled him out of the hole?

A. Yes sir.

Q. And then did anyone come up?

A. A whole lot of men come up; yes sir.

Q. But he pulled him out of the hole alone?

A. Yes sir, he helped pull him out.

Q. What did you do while he was pulling him out of the hole, if anything?

A. Well, I run to help him to blow the fire off of his clothes.

Q. Were there any others that helped after you took him out of the hole, to remove him?

A. After they took him out Mr. Bentley come up there.

Q. He was out of the hole then?

A. Yes sir.

Q. How far from it was he?

A. Just one side about fifteen feet.

Q. Fifteen feet?

A. Yes sir.

Q. What position was he when Mr. Bentley came up?

A. He was standing up.

Q. What?

A. He was standing up.

Q. Was he placed in any other position after that?

A. Not until after they put him in the little bed.

Q. Into the little bed?

A. Yes sir.

Q. Who went with him up to the hospital?

A. What is that?

Q. Who went with him up to the hospital?

A. I didn't see who came. I just kept attending to my own business there, you know.

Q. You are certain Mr. Bentley wasn't there when he was taken out of the hole?

A. Not before. Just when they got him out.

Q. Did you see this hot calcine when it started out to flow out from the bottom of the car?

A. I couldn't see it.

Q. Didn't see it?

A. Didn't see it.

Q. Were you in a position that you could have seen under the car?

A. Oh, if I lean down like that (illustrating) I could see it, but I couldn't see it standing up.

Q. You couldn't see it on the track after the car went by?

A. Yes.

Q. Did you hear Mr. Hammer say anything during that time?
A. At the time of the accident?
Q. Yes.
A. He just hollered.
Q. Hollered?
A. Yes sir.
Q. How far was the car over him at the time he hollered?
A. Farther about ten feet from the hole.
Q. Ten feet farther?
A. Yes sir.
Q. He didn't holler until the car had passed over him?
A. Oh, after the accident, you mean?
Q. Yes.
A. The car stopped about ten feet from the hole.
Q. The car stopped about ten feet after the accident happened, but I understood you heard him holler while the car was going over?
A. Well, I heard him holler while the car was running over, you know, but I didn't know that Mr. Hammer was there.
Q. You are positive, however, that the parties you have named were the only ones there before the accident, you and the two others and the motorman?
A. And the motorman, yes sir.
Q. And then Mr. Hammer; that was the fifth, wouldn't it be?
178 A. No, just four.
Q. Four, Will you describe to the jury the signal that Mr. Hammer gave after the helper left the bin in which he was at work?
A. What is that?
Q. Describe the signal that you say that Mr. Hammer gave after the helper left the hopper he was at, and went out and gave his signal.
A. Well, he was talking to him while he was sitting down in that hole, you know, while his helper was there. I just saw him move his hand right there like that. I couldn't hear what he said.
Q. That was after the helper left?
A. No, while the helper was leaning over there.
Q. Before the helper left?
A. He just stick in the hole, pull his head in like that (illustrating).
Q. Then what did the helper do?
A. Jumped to one side of the track and gave the signal to come ahead.
Q. Did the motorman come on then?
A. After the helper gave him the signal.

Mr. McFarland: That is all. Take the witness.

Cross-examination.

By Mr. Kearney:

Q. What is your name?
A. Gustavo Provencio.
Q. What relation are you to Mauro de Provencio?
—. He is my cousin.
Q. Est. Provencio?
A. He is my cousin.
Q. What?
A. He is my cousin.
Q. Well, you never told anybody at all anything about this case before coming here, did you?
A. No sir; I did not.
Q. This is the first time today you ever told any living person anything you knew about this case?
A. Yes sir.
Q. That is true, isn't it?
A. Yes sir.
Q. What are your regular duties about that smelter?
A. My regular duties is a common laborer; that is all.
Q. You are a common laborer?
A. Yes sir.
Q. You are working around the yards?
A. Yes sir, in the yards.
Q. On- job and another?
A. Yes sir.
Q. Since the accident the company hasn't laid you off, has it?
A. They didn't lay me off. I just keep working right the same.
Q. Did they increase your wages?
A. No sir, they did not.
Q. Since the strike did they give you any assistance?
A. No sir.
Q. What?
A. No sir.
Q. Did they give you any assistance to come down here?
A. No sir.
Q. They didn't furnish you any expense money? Didn't pay your expenses down here?
A. They paid my expenses overe here to Tucson; that is all.
Q. Is your recollection good?
A. How is that?
Q. Is your recollection good?
A. Yes sir.
Q. Did you and these other two Provencios ever talk this matter over?
A. Not before.
179 Q. Not before?
A. No sir.
Q. One never said a word to the other about it?

A. Not before this today.
Q. How?
A. Not before today.
Q. You don't think you did?
A. No sir.
Q. Can you explain to the jury how you all agree on the car being stopped twenty or twenty-five feet; how you are just the same on that?
A. How do you mean?

Mr. McFarland: If the Court please, I object to that question.
The Court: Objection sustained.

Mr. Kearney:

Q. Did you ever see me in Clifton?
A. Yes sir, I saw you there.
Q. Do you remember talking to me about this case at the pool hall there in Clifton?
A. Yes sir.
Q. Didn't you tell me that at no time there you could see Mr. Hammer?
A. I don't remember I told you.
Q. What?
A. I don't remember I told you.
Q. Isn't that what you told me?
A. Yes sir.
A. What?
A. Yes sir.
Q. And that you at no time—you could see Mr. Hammer, and you told me all you saw was the motion of Est., the motorman, to bring the car ahead; that is all you saw.
A. Yes sir; but you didn't ask me about Mr. Hammer in the hole.
Q. I asked you at the time if you could see Mr. Hammer in the hole and you said you couldn't see him.
A. No sir; I don't remember of saying that.
Q. What?
A. I don't remember of saying that.
Q. The fact is that you didn't see him?
A. I never told you that.

Mr. McFarland: I object to that.
The Court: Now, if you continue that between the attorney and the witness, you will get reversible error in this case, because you must not state facts when you are examining a witness. Now, gentlemen of the jury, counsel's statement of what he stated to counsel is not evidence in this case and you will not consider it for any purpose whatever.
Mr. Kearney: I will reframe that question for the purpose of putting an impeaching question.
The Court: Certainly you may.

Mr. Kearney:

Q. I will ask you if about four days before you came down here, that I was talking to you in the pool hall about this case, and you and I being present there, and I asked you what you knew about this case, and in that conversation didn't you say to me that you didn't see Mr. Hammer at all, because he was down in the hopper out of your sight?

A. I don't remember your asking me that question.

180 Q. And then further that you said in the course of that conversation that all you saw was the motorman give a signal to bring the car on? Did you or did you not then and there so state to me.

A. I didn't say anything about that.

Q. What?

A. I didn't say nothing about that.

Q. What?

A. I didn't say anything.

Q. You say you never did tell anybody anything about what you knew about this case?

A. No sir; I don't tell nobody.

Q. Never anybody at all?

A. No sir.

Q. Nobody ever asked you about this case, or what you knew about it?

A. No sir.

Q. What?

A. No sir.

Q. Can you explain how it was that you came to be called as a witness if you didn't tell anybody what you knew about this case?

A. Yes sir, you mean how it happened to me to be up there?

Q. Yes, at any time?

A. Well, I was working in the yard, you know, and one of the men of the furnace laid off that day, and the furnace man reported to the yard man, to the yard foreman to send a man up there, and the yard foreman sent me up there, you know.

Q. It wasn't your regular business to be up there at all?

A. No sir; it wasn't.

Q. Then after this accident happened weren't you called down before Mr. Flynn to make a statement?

A. Yes sir.

Q. What?

A. Yes sir.

Q. Did you sign that statement?

A. No, I didn't sign it.

Q. Then you did tell somebody what you knew about this case.

A. Yes, I didn't tell anybody else.

Q. What?

A. I didn't tell anybody else.

Q. What were you called before Mr. Flynn for?

Mr. McFarland: He says he didn't tell anybody else.

The Witness: I mean anybody else.

Mr. Kearney:

Q. Did you make a statement before Mr. Flynn?
A. No sir.
Q. Didn't he call you down there for the purpose of making a statement?
A. He called me just the one time, yes sir.
Q. What?
A. Just the one time.
Q. You didn't make any statement—didn't tell him anything about it?
A. No sir.
Q. Why?
A. I didn't know anything about it.
Q. You didn't know anything about it?
A. No sir, not until after.

The Court:

Q. What did you say the last? I couldn't hear you myself.
The Witness: I say I didn't say it to anybody else after making the testimony over there at Flynn's office.
Q. You didn't say it to anybody else after you made the statement over there to Mr. Flynn, you mean?
A. Yes sir, I never tell anybody else.
181 The Court: Now, these gentlemen have to hear you. They cannot hear you speaking in that undertone.

Mr. Kearney:

Q. Do you know——

The Court: If you were on the ball ground you could make a noise.

Mr. Kearney:

Q. Do you know Mr. Elliott?
A. Yes sir; I know him.
Q. Do you know Mr. McFarland here?
A. No sir, I don't.
Q. You don't know him?
A. No sir.
Q. Did you ever talk to Mr. Elliott about this case?
A. No sir.
Q. Did you ever talk to Mr. McFarland?
A. No sir.
Q. Never said one word to them about this case?
A. Not one word, no sir.
Q. Never told them anything about what you knew about it?
A. No sir.
Q. Did you tell Mr. Fraser?
A. No sir.

Q. Not a single person?
A. No sir; nobody else.
Q. This is the first time today that you ever told anybody what you knew about this case?
A. This is the first time, yes sir.

Mr. Kearney: That is all.

(Witness excused.)

A. B. JONES called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McFarland:

Q. What are your initials?
A. A. B.
Q. Where do you live?
A. Clifton, Arizona.
Q. How long have you lived there?
A. A year last February.
Q. A year last February. What is your business?
A. Smelter foreman.
Q. Smelter foreman?
A. Yes sir.
Q. What relation do you bear to the Arizona Copper Company, if any, the defendant in this case?
A. General foreman for the Arizona Copper Company at the smelter.
Q. Were you occupying that position last December?
A. Yes sir.
Q. And particularly on the 28th of December?
A. Yes sir.
Q. 1914. Were you at the smelter that day?
A. Yes sir.
Q. Do you know of a method—do you know of two methods of placing angle irons on top of hoppers?
A. I suppose there are several methods.
Q. Yes, you know of several. Do you know of angle irons having been placed on hopper Number 3 of the smelter?
A. Yes, sir.
Q. Do you know the method pursued in placing those angle irons on the hopper?
182 A. Over Number 3 furnace, yes sir. They were put on from the top.
Q. What do you mean by the top?
A. Well, the workman didn't get into the hopper.
Q. Didn't get into the hopper?
A. Yes sir.
Q. Was the entire work done by the party who did it up on top of the feed-floor?

A. On top of the floor; yes sir.

Q. Did you see this party placing angle irons on the top of hopper Number 3?

A. I seen him working there; yes sir.

Q. What was he doing when you saw him?

A. He was putting in angle irons.

Q. Well, what was his position at that time?

A. He was on top of the floor bolting up the angle irons at the time I saw him.

Q. Bolting them up?

A. Yes sir.

Q. That is, you mean fastening these bolts by a screw that screws on top or the bottom?

A. Sir?

Q. By the screws that fasten that angle iron on the top or on the bottom?

A. I couldn't say which end was which, but I think the bolts were on the bottom, the nuts were on the bottom.

Q. Was anyone helping him?

A. Yes sir; there was two of them there—three of them there.

Q. What were their positions respectively?

A. They were all on the floor.

Q. *Where* the angle irons placed on that hopper successfully?

A. Yes sir.

Q. Who are present when you saw them place these angle irons on the floor and on top of the hopper, remaining on that feed-floor?

A. Who were there?

Q. Yes, who were present?

A. Harry Nielson and Jack Morrison and the Mexican helper; I don't know his name.

Q. Was that before the accident to Mr. Hammer?

A. After.

Q. After the accident?

A. After the accident; yes sir.

Q. After the accident?

A. Yes sir.

Q. Well, how much experience have you had in iron working around smelters?

A. In iron working?

Q. Yes, with iron.

A. Well, I have worked a little in a machine shop, three or four years in a machine shop, around a smelter—different places—not in this country.

Q. You understand, do you, from that experience, the proper way to put on angle irons under the circumstances that they were put on by Mr. Hammer and the party you speak of?

A. Well, I don't know, the proper way—the safest way——

Q. What is the usual way of doing that, if you know?

A. Yes.

Q. What is the usual mode or method pursued in placing angle irons?

A. The majority of those were put on from the top at that particular job.

Q. From the top?

A. Yes sir.

Q. Did you ever see anyone pursue the method of putting angle irons on hoppers under the circumstances existing there by going down themselves in the hopper?

Mr. Curley: I object to the form of the question. It simply proves a negative. It doesn't prove anything in this case.

183 Mr. McFarland: I asked him whether he had seen anyone.

Mr. Curley: Whether he saw anyone is not material.

Mr. McFarland:

Q. With you- experience or knowledge of the situation, if you were to put angle irons on those hoppers what method would you pursue?

A. I would put them on from the top.

Q. Why?

A. Well, it would be safer.

Q. Would it be as convenient?

A. Possibly not quite as quick. You could probably do it quicker the other way.

Q. Was Mr. Fraser around hopper Number 3 at the time those angle irons were being placed, as far as you remember?

A. He wasn't on the feed-floor at the time I was up there. At that particular time—I think he was around during the time they were being put up.

Q. He is the manager, isn't he, or the superintendent of repairs?

A. Yes sir.

Q. That is his position?

A. Yes sir.

Q. It would be his duty to be around there, wouldn't it?

A. Yes sir.

Q. And to direct matters?

A. Yes sir.

Q. Did you see that calcine car the morning before the accident?

A. Yes sir.

Q. Where was it?

A. I have seen it several times.

Q. The morning before the accident?

A. Yes.

Q. What did you do, if anything, at any one time that you saw it the morning before?

A. Before the accident?

Q. Yes, the morning before the accident?

A. The car was standing on the floor there and I saw them working there, and I cautioned the motorman to obey his rules.

Mr. Curley: I object to that, if your Honor please.

Mr. McFarland: He is his superior. I suppose it would be proper.

The Court: I will sustain the objection unless it was in the presence of Mr. Hammer.

Mr. McFarland:

Q. Well, did you inspect or cause that car to be inspected that day?

Mr. Curley: I object as immaterial.

The Court: The objection is overruled. You remember the question you asked him as to the condition of that car, and why it let the slag through, or the calcine through.

A. Yes sir.

Mr. McFarland:

Q. What was its condition?
A. It was all right, in good condition.
Q. Now you say you inspected the car?
A. Yes, I did.
Q. Did you inspect the rods and the brakes?
A. No, I inspected the door or slide.
Q. The door?
A. Yes sir.
Q. In what condition was that?
A. That was all right.
184 Q. In what condition was it in other respects?
A. It was all right.

Mr. McFarland: Take the witness.

Cross-examination.

By Mr. Kearney:

Q. That car was in good condition at the time of the accident?
A. Sir?
Q. At the time of the accident that car was in good condition?
A. It was after the accident I inspected the car, and there was nothing wrong with it then. That is, the gates.
Q. Well, was it in good condition at the time of the accident?
A. Yes sir, I presume it was because right after the accident I inspected it.
Q. Then why did the calcine run out?
A. It caught something and pulled the door open, I presume, I closed the door myself and it was all right.
Q. What would it catch on, Mr. Jones, in going down there?
A. Well, it should not have caught on anything.
Q. Then why did you say it caught on something?
A. Well, I presume it did. It wouldn't open itself. It is impossible for it to open itself.
Q. Don't it open rather hard?
A. Sir?
Q. Don't it open rather hard?
A. Rather hard.
Q. Yes the lever that opens it pulls pretty hard, don't it?
A. It takes a fair pull to open it; yes sir.

Q. If the lever there was properly closed the calcine wouldn't run out, would it?

A. Certainly not.

Q. Then if the slides there were closed in that car when it went over the hopper in which Mr. Hammer was working he wouldn't have been burned, would he?

A. No sir; certainly not.

Q. Then the reason why that—that calcine ran out of that car is because someone managing it, or that it caught on something on the track that pulled the slide-door open?

A. Yes sir, I presume that is what happened.

Q. If the party in charge of that car, before passing over that hopper which Mr. Hammer was in, if he inspected that slide-valve and kept it shut, there would have been no harm, would there?

A. If that slide-valve was open he couldn't move the car.

Q. Well, how would that—how would the calcine get out if it wasn't open?

A. I say if the valve had been open when he started his car he couldn't move it.

Q. Didn't you state just a moment ago if the car was properly closed the calcine wouldn't run out?

A. It won't.

Q. Well, then, it did run out, didn't it?

A. It didn't run out when it was closed.

Q. How did that calcine get into the hopper where Mr. Hammer was working?

A. It run out of the door I presume.

Q. The door must have been open then, wasn't it?

A. Yes sir, it was open.

Q. You think that Mr. Hammer could have done little
185 quicker work by getting down in that hopper than he could have done on the top?

A. On the top, I expect so.

Q. Could he have done a better job; couldn't he have made a closer fit?

A. I don't know that he could, no; I don't see any reason why he could.

Q. Wouldn't he have a better opportunity to mark it off with more precision?

A. No, I don't think he could.

Q. Do you know?

A. Do I what?

Q. You wouldn't say that he couldn't, would you?

A. I wouldn't say that he couldn't.

Q. What?

A. I say so, I wouldn't say that.

Q. You didn't do any of that work yourself, did you, on that furnace where Mr. Hammer was working?

A. No sir.

Q. You didn't put any of those angle irons in, did you?

A. No sir.

Q. You are in charge of a different department there, foreman of the smelter department?

A. Yes sir; operating department.

Q. And you would not wish to take the position, Mr. Jones, that Mr. Hammer did not do that job properly?

A. Sir.

Q. You would not wish to state that Mr. Hammer did not do that job in the proper way?

A. In a proper way? Just what do you mean by a proper way?

Q. Proper manner, or method—he didn't pursue a proper method in doing the work?

A. He didn't pursue the safer method.

Q. You would not say that he didn't pursue a proper method, would you?

A. No, I would not.

Q. Well, safe enough if that car hadn't been run over him, wouldn't it be?

A. I didn't just catch that.

(Question read.)

A. Had he gotten out of the hopper.

Q. It would have been safe enough if the car hadn't run over him.

A. Had he gotten out of the hopper when the car was passing over him.

Q. Or if the boy in charge of that, or the person who was in charge of that car—if he had kept that valve at the bottom shut, there was no danger, was there?

A. The boy didn't have the opening of that valve. It is impossible to open that valve, the man running the car to open that valve, when the car is running; and if the car is standing, and you open the valve you can't move the car. You haven't power.

Q. Mr. Jones, if that valve had kept shut there was no danger, was there?

A. Sir?

Mr. Kearney: Read the question.

(Question read).

186 A. I would consider it dangerous, yes, to stay under a car loaded with hot calcine at any time.

Q. Then would you say that car was in proper condition?

A. Yes sir.

Q. If a car is in proper condition it won't leak out the calcine, would it?

A. No sir.

Q. It wouldn't discharge the calcine until that lever was pulled for that purpose, would it?

A. No sir.

Q. Then if that car had been kept in proper condition, its valves closed, in passing over there it wouldn't have spilled out any calcine, would it?

A. The car was in proper condition.

Q. Why did it spill out the calcine?
A. Well, something opened the valve.
Q. That is what I said awhile ago. If it had been kept closed no calcine would have come out.
A. Certainly not. It couldn't come out.
Q. Then Mr. Hammer was in no danger then, was he, if that valve had kept shut?
A. No, but there is always a possibility of hot stuff going over.
Q. There is a possibility?
A. Yes.
Q. Did you ever know of such an occurrence as that happening there before?
A. Sir?
Q. Did you ever know of such an occurrence as that happening before?
A. Of calcine?
Q. Yes, flowing out as it did there at the time Mr. Hammer was injured?
A. Did I ever know of it occurring before?
Q. Yes sir.
A. No sir, nor since.
Q. Say, I am going to ask you. Maybe you know. On the track where this car went over, the ways there, or platform, was there something there to catch the bottom of the car to pull the valve open?
A. There was an angle iron laying there on a small pile of slag—ores—that could have caught the car as it passed over. I threw the angle iron off of the track myself before I brought the car back.
Q. You know the angle iron was there when the car passed over it?
A. No, I wasn't at the place. They sent for me. They couldn't get the car back. The door was open and they couldn't move the car. I went up and closed the door—had it closed, and moved the car back and looked to see what caused it to open. I found an angle iron in a pile of slag between the track—between the rails—between the tracks.

Mr. Kearney: That is all.

Redirect examination.

By Mr. Elliott:

Q. Mr. Jones, did you examine the ground at the hopper after the accident to Mr. Hammer? Did you examine that ground there?
A. I presume——
Q. Did you examine the top of the feed-floor there?
A. Yes sir.
Q. Where did that spill begin? Was it before the car reached the hopper or at the hopper, or after it left the hopper in which Mr. Hammer was?
187 A. There was practically no calcine on the—let's see—on the north side of the hopper. It was strung along on the

south side, probably forty feet. The car was probably forty feet over when I got there.

Q. The spill was beginning at the hopper?

A. Yes sir.

Q. Close to the hopper?

A. Yes sir.

Q. Then if something interfered there to open that door, it interfered at or near the hopper?

A. Yes sir.

Q. Practically at it?

A. Yes sir.

Q. And in your opinion was that angle iron in a position and sufficient to have opened the doors?

A. It could have caught there; yes sir, in my opinion.

Mr. Elliott: That is all.

The Court: That is all, Mr. Witness.

Mr. McFarland: We would like to have that helper, Mauro Provencio, recalled.

The Court: It is five minutes to five now. Gentlemen of the jury, you will remember the instructions I have heretofore given you and keep them. Report tomorrow morning at half-past nine.

SATURDAY, Nov. 27th, 1915—9:30 a. m.

The Court: Proceed.

Mr. McFarland: If your Honor please, one of the witnesses who testified yesterday, this young Mexican, came to me last evening and said he got confused on the stand yesterday, and on reflection he finds that he wants to correct his testimony.

The Court: Very well.

GUSTAVO PROVENCIO recalled as a witness on behalf of the defendant herein, having been previously sworn, further testified as follows:

Direct examination.

By Mr. McFarland:

Q. You say you want to correct——

A. I want to correct a mistake I done.

Q. —your testimony yesterday in some respect?

A. Yes sir.

Q. Just state to the jury?

A. Mr. McFarland asked me a question about that I didn't tell nobody else besides this man, Mr. Elliott and Mr. McFarland. He asked me a question if I didn't tell anybody else besides Mr. Elliott and Mr. McFarland. I got confused yesterday, you see, and I said no, and I spoke to Mr. Elliott and Mr. McFarland at the hotel.

Q. Spoke to whom?

A. Spoke to Mr. Elliott.

Q. And myself you mean?

A. Yes sir.

188 Q. Now, how old are you?
A. I am eighteen years old.

Mr. McFarland: That is all.

Cross-examination.

By Mr. Curley:

Q. You stated yesterday that you did not know Mr. McFarland, didn't you?
A. I didn't know him by the name until today.
Q. When you were asked if you had ever talked to Mr. McFarland, didn't you state that you did not know him?
A. Yes sir; I did not know him before.
Q. When did you find out that you had gotten confused on your testimony?
A. Yesterday evening.
Q. Who told you?
A. I did myself. I was in Mr. McFarland's room yesterday evening.
Q. Oh, you were in Mr. McFarland's room yesterday evening?
A. Yes sir.
Q. And you found out that you had been confused?
A. Yes, sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. McFarland:

Q. Were you in my room last night?
A. Yes sir.
Q. And that is when you first found out that you had been confused?
A. Yes sir.
Q. When you were in my room?
A. Yes sir.
Q. How did it just occur to you in my room?
A. I tried to think it over, you know.
Q. Did you think it over before that or at that time?
A. Before that.
Q. Before that, and then you came and told me about it?
A. Yes sir.

Mr. McFarland: That is all.

(Witness excused.)

A. B. JONES recalled as a witness on behalf of the defendant, having been previously sworn, was recalled and further testified as follows:

Direct examination.

By Mr. McFarland:

Q. I forgot to ask you one question yesterday which I will ask you now. What was the condition of the hopper Number 3 on which you stated the angle irons had been placed by a party from the surface of the feed-floor, at the time that he put the angle irons on?

A. It was practically full of ore, and the furnace running. That would be pretty hot in there.

Q. In the condition in which you state, you testified yesterday, as I understand, that the angle irons were placed on that hopper from the surface?

189 A. Yes sir.

Mr. McFarland: That is all.

Cross-examination.

By Mr. Curley:

Q. How full, Mr. Jones?
A. Sir?
Q. You say it was practically full of ore. How full was it?
A. Oh, probably half full.
Q. Probably half full?
A. Yes sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. McFarland:

Q. That varies, doesn't it, the amount of ore?
A. Yes.
Q. Sometimes it is nearly full?
A. Sometimes it is clear full, as they happened to use it out, and then it is refilled again. It is most of the time full when the furnace is running.

Juror Pacho:

Q. What is the distance between the valve on the bottom of the car from the flooring?
A. You mean the gate that opens the calcine car?
Q. Yes.
A. Oh, probably ten inches.
Q. Ten inches?
A. Probably that; yes sir.

Juror Pacho: That is all.
(Witness excused.)

MAURO PROVENCIO recalled as a witness on behalf of the defendant, having been previously sworn, further testified as follows:

Direct examination.

By Mr. McFarland:

Q. How did you get the—how about the angle irons—where were they taken from up to the surface of that feed-floor?
A. Where were they taken?
Q. Yes, where did you get them?
A. We got them down on that boiler shop.
Q. Well, did you take any angle irons onto the feed-floor after dinner in the afternoon of the day that Mr. Hammer was hurt?
A. Yes sir.
Q. How many?
A. I took one and he took one.
Q. What did you do with the one which you took up?
A. I took them down where we were working.
Q. Well, what did you do with it? Did you give it to anybody?
A. Yes, I gave it to him when he *get* in the hopper.
Q. When he got in the hopper you gave him the one you brought up?
A. Yes sir.
Q. Were there but two up there?
A. Yes sir.
Q. The one he took and the one you took?
190 A. Yes sir.
Q. That is all there was there?
A. Yes sir.

Mr. McFarland: That is all.

Gentlemen, I will read you what it is agreed between the parties to this case would be the testimony of Harry Nielson, if he were present.

Mr. Curley: I don't know whether that statement is just an accurate statement of the conditions or not, your Honor. There is an affidavit filed here by Mr. Fraser that this party would testify to certain facts. In order to avoid a continuance we are compelled to agree that if present he would testify to the stated facts. It is stipulated.

Mr. McFarland: Well, if he were here he would testify as in that paper contained.

Mr. Curley: I just don't like it to go to the jury that it is a case of open stipulation upon our part.

The Court: Well, as a matter of fact, whenever a witness is absent, as is the case here, and they are unable to secure his testimony, and the opposing side, as in this case, admits that if he were here he would testify to the facts stated in the paper filed; then it goes to the jury as though that witness were present and testifying as a witness

in the case. You do not admit the truth of the statements therein contained, but you do admit——

Mr. Curley: I just wanted the jury instructed.

The Court: Let me finish please. But you do admit—and I want the jury to understand—that they admit that if the witness were here present testifying, he would testify to what will be read in your presence and hearing.

Mr. Curley: But that we do not admit the truth of the facts.

The Court: I have already stated that.

Mr. McFarland: Yes, just like any other witness.

(Reading:) "State of Arizona, County of Pima: George W. Fraser, after being first duly sworn——

The Court: That part need not be read. Just read what that witness would testify to if he were present.

Mr. McFarland (reading): "That said Nielson, if present, at this time would testify that on the 28th day of December, 1914, he was foreman of repairs at defendant's smelter, at or near Clifton, Arizona, and as such foreman, one of his duties was to instruct employees in his department as to the method or methods by which said employees in his charge were to construct and repair certain parts of machinery over which he had charge as foreman of repairs; that some two weeks prior to the alleged accident and injury of plaintiff, he directed
191 the said plaintiff to go upon the feed-floor of defendant's smelter and place angle irons on top of the hoppers and below the feed-floor level. The purpose of placing the angle irons on top of the hoppers was to prevent material placed in said hoppers from overflowing through the space between the top of said hoppers and the bottom of said feed-floor. This space between the top of the hoppers and the bottom of the feed-floor was left at the time of the construction of the furnaces in said smelter, and the closing of this space was a necessary work in the completion and operation of the smelter, and in the protection of employees working below the hoppers; that at the date of the direction to the plaintiff to place angle irons on top of these hoppers, the said Harry Nielson directed and instructed plaintiff in person specifically that in placing these angle irons he should remain upon the surface of the feed-floor of said smelter, and in no event should he get into the hoppers at any time during his work in placing these angle irons, as trains were passing from time to time, back and forth over this feed floor, and over the hoppers where he would be engaged in placing the angle irons; that remaining upon the surface of the feed-floor was the only safe method of placing the angle irons; whereas the method of placing these irons by getting into the hopper while placing the same was a very dangerous method; and in no event to attempt to place them by getting into said hoppers under the feed-floor, but to remain on top of the feed floor in placing these angle irons on the hoppers, as it was a perfectly safe way; whereas the other method of getting into the hopper was an extremely dangerous way. That in supplementing that particular instruction the said witness, if present, would further testify that he went upon that feed-floor with the plaintiff, and standing above said hoppers in person showed said

plaintiff the safe and proper method of placing said angle irons, without getting into said hopper. That there is no other person to the affiant's knowledge who would testify to the facts herein stated; that there is no other witness present who has any knowledge of the facts herein stated; that would or could testify to the facts above stated; that there is now and has been since the 11th day of September, 1915, a strike in progress against this defendant in which a large majority of employees of defendant are participating; this condition necessitating the closing down of the smelters, mines, and all other works of the defendant. Owing to this condition many of the employees have gone to different places—some to other states—and among those Harry Nielson, who affiant is advised and believes——"

Mr. Curley: I object to reading any of the affidavit except the——

Mr. McFarland: This tells why he is away, and why he can not get here.

Mr. Curley: That is immaterial as far as the jury is concerned.

The Court: Yes, that is immaterial, and counsel's statement that they admitted that because they wanted his statement is immaterial. All those matters are preliminary to the introduction of this testimony, at the commencement of the trial, and all that is
192 directed to the jury is what you expect to prove by this witness were he present.

Mr. McFarland (reading): "That said Harry Nielson if present would further testify that he did not know, nor did defendant or anyone who had authority to represent the defendant know that plaintiff had adopted a different method in placing said angle irons to the method directed by said Harry Nielson, until after the alleged accident and injury."

Mr. Elliott: We will call Doctor Butler.

JOEL IVES BUTLER, M. D., called as a witness on behalf of the defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Elliott:

Q. Doctor, will you please state your full name to the Reporter?
A. Joel Ives Butler.
Q. What is your profession?
A. Physician.

Mr. Curley: We will concede the Doctor is qualified.

Mr. Elliott: I will just ask one or two questions.

Q. Where are you practicing, Doctor?
A. Tucson.
Q. Are you connected with any organization here?
A. With the Rodgers Hospital.
Q. What particular line of work, if any, do you carry on at the hospital?
A. Surgical work.

Q. Are you acquainted with Mr. Joe Hammer here, the plaintiff in this case?

A. No, I am not.

Q. Have you ever made any examination of him?

A. No, I have taken X-Ray pictures of him, but simply as an X-Ray operator. I made no examination.

Mr. Elliott: For the purpose of convenience and to expedite the examination I ask that Doctor Butler be allowed to examine Mr. Hammer's hand.

Mr. Curley: We have no objection.

Mr. Elliott:

Q. Will you examine Mr. Hammer's left hand, please, Doctor?

(The witness left the witness stand and proceeded to examine the plaintiff's left hand; after which the witness resumed the stand.)

Q. Now Doctor, assuming for the purpose of the questions I will put to you—assuming that this hand of Mr. Hammer's was injured on or about the 28th day of December, 1914, and that Mr. Hammer submitted himself to certain treatment from the time of the injury until about the month of July, 1915. That places the period from the time of the burn at almost a year; your examination of
193 the hand here today about eleven months. Now, if you had a case of a burn of a little finger such as Mr. Hammer's here, in which scar had drawn it into the palm and rendered it useless and in the way, in your opinion would it not improve that hand to remove the fingers, the little finger?

A. Yes, it would.

Q. In a hand where the little finger is drawn down to the palm and interferes with the usefulness of the hand, it would then be a benefit to remove the finger, in your opinion?

A. Yes sir. I might add that providing that finger could not be surgically restored, plastic surgical operation.

Q. What is your general opinion, Doctor, of the condition of Mr. Hammer's hand from your examination of it?

A. Why, that he has a decidedly impaired member. The hand, or the function of the hand is decidedly decreased; the value of the hand is decidedly decreased at the present time.

Q. If you had such a hand even a year after the inju-y, in your opinion could this hand be now operated upon and improved?

A. Very much.

Q. How?

A. By plastic surgical operations which would release the adhesions and increase the mobility of the tendons; also make the skin more movable, and consequently, permit the fingers to regain their function.

Q. In your opinion then might it be possible that with proper treatment as you have detailed here, to give Mr. Hammer a fairly useful hand?

A. Yes sir; he has considerable use of the hand now, and which could be very much increased by proper surgical treatment.

Q. You say he has considerable use?

A. The hand under the present conditions, if nothing further is done with it, will be of considerable value to him.

Q. Then assuming that Mr. Hammer has a fairly good hand except for the little finger, which could not be fixed possibly would it be possible to remove the little finger and Mr. Hammer have a useful hand for almost any kind of manual labor?

A. Well, the removal of the little finger would get that out of the way. He would not be hampered by this deformed little finger, and as time goes on, the scars will—and the plaintiff attempts to use the hand—will release, will mobilize the fingers very much more than they are at present.

Q. You have seen this hand after it has been allowed to draw and contract for nearly nine months. Is this drawing not a kind of continuing process; the fingers for some months being inclined to keep contracting if not interfered with or prevented in some manner?

A. Yes, scar tissues always tends to contract.

Q. Do you think that Mr. Hammer himself by his own manipulation, independent of any treatment of the doctor, might have extended his fingers well enough to have prevented this natural contraction?

A. I don't know how much he has attempted to, but the attempts of the patient, the efforts of the patient are always very useful in preventing contraction. The patient himself usually has nothing else to do but work at his hand, massage his fingers; and passively they can do a good deal.

194 Q. Now, what do you—in respect to preventing the drawing up of these fingers, what would you have prescribed, say two or three months after the injury upon healing of the burns?

A. Why, I should have used some device which would have prevented the—which would have tended to hold the fingers in the straight position rather than permitting them to contract. Then, as I say, massage and manipulation and movement would have also done that.

Q. What generally would be the character of the device that you might use?

A. Usually a straight splint.

Q. Now, Mr. Hammer on the stand here has testified that Doctor Smith, his first attending physician, wished to break down his fingers. What is meant by that, by surgeons and physicians, the words, breaking down?

A. Well, it usually expresses breaking down of adhesions by forcible manipulation, forcible movement of the contracted members, straightening them by pressure.

Q. That also might be done with the use of a splint?

A. Well, the splint will retain it in that position, that is obtained by the manipulation. And then there are devices, spring splints

which keep a continual pulling on the finger, placed behind the finger and keep a tension on the finger.

Q. Now, Doctor, if you had a patient who was dependent on manual labor for a living, and you advised the removal of the little finger to improve his hand, and also advised straightening the other fingers under gas, and he decided not to have anything done by you or anyone else, would you be in a position to do him any good?

A. I don't know anything else that could be advised for him.

Q. You would consider that to be the proper surgical advice to give in such case?

A. Yes sir.

Q. And one that should be followed by the patient in order to obtain the best results in the case?

A. Yes sir.

Q. Then from your testimony, Doctor, you would not advise amputating all the fingers of Mr. Hammer's hand, leaving just the stump there?

A. No.

Q. Why not?

A. Because several of the fingers are useful.

Q. They are useful, now, and could be made more so?

A. If not useful at the present time.

Q. Now, if Mr. Hammer's hand could have been operated on and treated in the manner in which you have suggested to be the proper operation and treatment, by straightening or by cutting if necessary two or three months after the burn, the original injury, how long, in your opinion, would it take to clean up such treatment and return the plaintiff to doing some kind of work?

A. He should have had—I should think this hand would have been restored to function in six months. I think that is a good fair estimate of time.

Q. Then if Mr. Hammer had submitted himself to such an operation and undergone such treatment, even now he might have returned to some work?

A. Yes, I think so.

Q. If you passed a stomach pump, Doctor, into a patient, and extracted a test meal from the stomach, and on testing it for blood you found blood, would you consider that to mean that the patient had an ulcer of the stomach conclusively?

195 A. No, there are other factors that would have to be considered.

Q. What are those other factors?

A. You would have to consider the food—have to consider as to whether he had eaten meat, meat of some animal previously. For instance, there is a possibility that the stomach may retain a meal previously eaten for some time. I have seen them for a number of days, and of course the blood which was taken with that meat would show a test, would show in the test. And then you stated the stomach tube was used?

Q. Yes.

A. There is always a possibility that a tube, even though rubber,

may have abraided and scratched the mucuous membrane in the stomach, which is rather sensitive membrane, and given bleeding by that cause, which would show a test meal.

Q. And is it not a fact that the smallest amount of blood that might be started by that stomach pump going down into a patient would show in the test meal?

A. The tests are very delicate.

Q. If upon examining a patient to determine whether he had a stomach ulcer, and if on examination of the patient's stools you found no blood, wouldn't the absence of blood speak against the existence of a stomach ulcer?

A. You say if no blood——

Q. No blood was found, would not the absence of blood speak against the existence of a stomach ulcer?

A. Yes, the majority of instances show blood in the stools.

Q. Can you state from your experience and knowledge what percent of cases show a trace of blood?

A. In at least seventy-five percent of cases would show blood in the stools.

Q. Get a positive blood test?

A. Get a positive blood test in the stools.

Q. Now, in your opinion from your experience as a physician and surgeon, what connection is there between burns and ulcers of the stomach?

A. Why, I have never seen any cases associated—never seen any ulcers associated with burning cases. The literature on the subject always mentions burns as—ulcers as a possible sequence of extensive burns. I have never seen a case. I might add there is other recent literature, of which cases studies have been made, and in which no association has been found.

Q. I was just going to ask you if it was not the later theory, based upon research and examination, compilation of statistics, that there appears to be no connection between burns and stomach ulcers, and that the old text-book theory is now rather exploded?

A. Yes it has. Recent studies have destroyed that idea.

Mr. Elliott: Take the witness.

Cross-examination.

By Mr. Curley:

Q. What recent study do you refer to, Doctor?

A. Some books by authoritative writers in which they have made studies of their cases, and the history preceding their cases
196 of ulcers, and have found no association.

Q. You stated though that recent study had exploded that. Now you aren't giving your own opinion of that, are you?

A. I have stated I have never seen any association myself. Consequently, my own experience, study or histories of my own cases would bear out that statement, that no association is there. My experience would be too small to base any generalizations on, and con-

sequently I pay more attention to those who have had a great many more cases.

Q. What experience have you had with stomach ulcers which would permit you to testify as to your own experience?

A. Well, I have probably seen between one hundred and two hundred cases of stomach ulcers.

Q. In these cases which you have seen did you make tests to ascertain the probable functions of the ulcer, the characteristics of it?

A. They were all thoroughly—the cases were thoroughly studied.

Q. How many cases of stomach ulcers have you had come under your personal supervision in which it were possible for it to have been caused by a severe burn?

A. Well, as I say, I know of no cases at all in which the association between burn and ulcer appears in any way.

Q. What position does Doctor Osler occupy in the medical world?

A. There is no greater authority.

Q. There is no greater authority?

A. No sir.

Q. And Doctor Osler's theory is that there is a connection between the burn and the ulcer.

A. His text-books always give that as a possible cause of ulcer.

Q. And you regard him as probably one of the greatest authorities?

A. I do. Probably not on this particular subject, but as a whole.

Q. As a whole?

A. As a whole, there is no greater authority that I know.

Q. Now you stated that this operation upon Mr. Hammer's hand would probably have restored it to a great degree, to its normal condition?

A. Yes sir.

Q. Did you take into consideration there the general condition of his arm from the wrist up?

A. I examined it as far as the scar on his wrist.

Q. Do you know what the general condition of his arm is at the present time?

A. Not above the wrist.

Q. So that in testifying as to the probable return to a near-normal condition, you simply had reference to the fingers, to the functions of the fingers?

A. To the injuries that appeared to his hand. I was speaking about the possibility of returning function for the hand.

Q. Would it be possible, Doctor, in your opinion to ever produce anything like a normal hand, a normal arm, out of Mr. Hammer's left hand and arm?

A. Well, you mean like—he would have a hand that was—with which he could do very many things, which would be useful.

Q. Yes. Mr. Hammer's occupation for a great many years has been that of a boiler-maker, in which he would, of course, want to use a large hammer in either hand. What would you say as to restoring that left hand to a condition under which Mr. Hammer would be able to resume that occupation?

197

A. Is he right-handed or left-handed?

Q. He is right-handed.

A. I am not very familiar with the boiler-maker's trade. So far as I know, he will have—I know that the business is—he will have a hand in which he can securely grasp practically anything that he wants to.

Q. And after having grasped it what would you say as to his being able to use it with effect in a boiler-maker's job?

A. As far as the hand was concerned, he would be able to use it.

Q. Would the cutting off of the little finger impair the use of his hand in any way, as far as grasping is concerned?

A. Yes it would.

Q. It would. You stated, I believe, that at the time of Mr. Hammer's injury, that in your opinion a certain line of treatment would have left Mr. Hammer's hand in a very much improved condition.

A. Yes sir.

Q. If you had had Mr. Hammer under your care during all that time and his hand had resulted in its present condition what would you think as to the mode of treatment, that he had received?

A. Well, I should think there had been neglect of the hand.

Q. You would think it had been neglected?

A. Yes sir.

Mr. Curley: That is all.

Redirect examination.

By Mr. Elliott:

Q. Doctor, if you had advised the carrying on, or offered to carry on this treatment of Mr. Hammer and he had refused to submit to it, would you still feel that you had neglected him?

A. No.

Q. Would the scar on Mr. Hammer's arm interfere at all with the functions of his hand?

A. Well, you mean—I haven't seen his arm. I examined his hand only.

Q. As referred to by Mr. Curley?

A. I have not seen—you mean those that are in sight now below the wrist, from the wrist down? I did not examine—I only examined the hand, and am aware of the injuries. As far as anything I saw was concerned, very much can be done with the hand to improve it.

The Court: I didn't understand that.

The Witness: I say as far as anything I saw is concerned very much can be done for the hand by surgery to improve it.

Mr. Elliott:

Q. Are you familiar with Doctor Moynihan's work known as Duodenal Ulcer?

A. Yes sir.

Q. On that particular subject would you consider Moynihan as good or better than Osler?

A. I should.

Q. Which?

A. He is better. There is no one ranks higher than Moynihan on the subject of ulcers of the intestinal tract or the stomach and duodenum.

198 Q. State if you can, Doctor, what position in your mind Moynihan takes in relation to burns relating to ulcers?

Mr. Curley: I object to that, if your Honor please.

The Court: Objection sustained. The witness may give his opinion as an expert and he may base his opinion upon the work of a particular eminent author on the subject of the disease or injury in question.

Mr. McFarland: If the Court please, the defendant rests.

The Court: Anything in rebuttal?

Mr. Curley: Yes, your Honor.

The Court: I hope you will confine it strictly to rebuttal.

Mr. Curley: Yes, your Honor, strictly.

ELMER BENTLEY, called as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Curley:

Q. Mr. Bentley, do you know Mauro de Provencio, the young fellow that testified here who was a helper to Mr. Hammer at the time he was injured?

A. Yes sir.

Q. Immediately after Mr. Hammer's injury did you have any conversation with him as to why the boy operating the car did not stop the car before it ran over the hopper?

Mr. McFarland: I object to that. No foundation is laid for this.

Mr. Curley: Oh, yes, there was. Mr. Kearney asked that boy a question that we had written down here: "Immediately following the injury to Mr. Hammer didn't Mr. Bentley say to you, 'what was the matter with the fellow, (referring to the motorman) that he didn't stop the car.' Did you not then say to Mr. Bentley, 'The brakes wouldn't work,' or words to that effect."

Mr. McFarland: I have no recollection of that particular conversation at that time or place. Any way, if your Honor please, it is apparently immaterial what the condition of the brakes was—wholly immaterial for the reason that this action is not based upon negligence. It is based upon an accident occurring in a hazardous occupation while the party is pursuing his occupation,—growing out of it. That is the basis of this action. It is wholly immaterial whether there was any brake on it or not. The defendant may be ever so negligent, but under the law upon which this action is based it is not at all material. The only feature that is material is the neg-

199 ligence on the part of the plaintiff. If his negligence caused the injury or produced the injury, he cannot recover, but it

is bringing into the case an entirely foreign element. It has no place in the case. The statute with which your Honor is so familiar says that if one receives an injury in a hazardous occupation—smelting is one—while pursuing the particular duties of his occupation, in the course of his employment, the defendant is liable provided that the accident and injury did not result from the negligence of the plaintiff. Now, where does the negligence of the defendant cut any figure in this action. It is all out of place, and the only reason that I called that little boy in here this morning and asked him how many angle irons were taken up there—he said there were two, and the one he took up was give- to Mr. Hammer—was to rebut what they said about that angle iron on cross examination yesterday afternoon. But for them I should never have done it, and I will only say I was neglectful that I did not object to that testimony at the time because it was wholly immaterial. I don't care what the condition of that car was—good, bad or indifferent. My theory of this situation is that the defendant is practically an insurer of the safety of persons in hazardous occupations, unless caused by the negligence of the employee himself. If so, he cannot recover. Now why should we go out of the issues in this case and the material facts that cause or constitute the grounds of action and speculate? You might just as well ask the condition of the track, whether the smelter was constructed properly, or any other fact tending to show want of care on the part of the defendant. Now there is an action brought under the compulsory compensation act. Then it would have been a fact in the case, but not under the employers' liability act. It is solely upon an accident occurring to one in a hazardous occupation while he is pursuing his duties in that hazardous occupation, that constitute the cause of action, and even then, if that be true, that is all they have to prove except that they must show to the jury's satisfaction by a preponderance of the evidence that the injury did not result from his own want of care or negligence. If it did, it bars this case. I say it is wholly immaterial, and I object to it.

Mr. Curley: If your Honor please, Judge McFarland's theory as to the law in the case is absolutely correct, but the purpose of this testimony is to impeach the witness. Now Mr. Bentley testified that this car moved continuously from the time it came upon the floor until it moved over the hopper where Mr. Hammer was. Mr. Hammer said when he first saw the car, the car was within five feet of him. Now here is a boy that says the car stopped twenty-five feet, and after hearing some conversation with Mr. Hammer, he motioned to the motorman and the car came on.

The Court: I don't care to hear any further argument.

Mr. McFarland: Well, one more thought, and I will submit it; that you cannot impeach a witness upon an immaterial issue.

The Court: The trouble is, that you and the other side both entered into an examination of the condition of that car and
200 you permitted it to be introduced without objection. Both sides examined into it and for that reason——

Mr. Curley: The purpose of the question is to impeach the witness.

The Court: I understand that, but you cannot impeach the witness upon an immaterial matter. The question is this: where parties frame their issues to try a case upon a certain theory and introduce testimony with reference thereto, I don't think you can be heard to say afterwards that the evidence was immaterial.

Mr. McFarland: Now, let me ask your Honor one question, if I may be permitted to. I don't mean to trespass upon your Honor's domain.

The Court: I understand.

Mr. McFarland: But won't your Honor instruct this jury that the negligence of the defendant will cut no figure in this case?

The Court: Yes.

Mr. McFarland: Then why would it be proper or pertinent to have the witness testify as to what another fellow said about the brakes?

The Court: Well, I don't like to give my reasons for my ruling in the presence of the jury, but inasmuch as you ask me, if you desire——

Mr. McFarland: No sir.

The Court: I shall state the reason and permit the question. I overrule the objection. You may answer the question.

(Question read.)

Mr. McFarland: We save an exception.

A. I did; yes sir.

Mr. Curley:

Q. What did he say?

A. He said——

The Court: Now, you will have to put the same question to him that you put to the other witness

Mr. Curley:

Q. Did you then state, or did you then ask this Mauro Provencio a question similar to this: "What was the matter with the fellow, (referring to the motorman) that he didn't stop the car?"

A. I did.

A. And did he not then say to you——

The Court: Did he or not then say to you——

Mr. Curley:

Q. "The brakes wouldn't work, the fellow said," or words of that import?

201 A. He did, he says the brakes was no good.

The Court: Answer the question "yes" or "no."

Mr. McFarland: We object to that. That is hearsay.

The Court: The latter part of his answer is stricken out. His answer "he did" is allowed to stand. The objection is overruled.

Mr. Curley:

Q. Mr. Bentley, was Gustavo Provencio there at the time of this injury?

A. That is the tall Mexican that was here?
Q. Yes.
A. No, sir, he was not.

The Court: You have gone over that.
Mr. Curley: How is that?
The Court: I say you asked all those questions on direct examination.
Mr. Curley: I did not recall whether I asked him about that or not.
The Court: Whether the Mexican assisted in taking him out of the hole.
Mr. Curley: Yes, but there are three Mexican boys here now. I am asking him about Gustavo now, whether he was present.
The Court: Well, he said he wasn't. I will let the answer stand.

Mr. Curley:

Q. Mr. Bentley, would it have been possible to have put angle irons in one of those hoppers if it had been more than half-full or half-full?
A. No sir.

Mr. McFarland: Just wait a minute. We object to that. That would be——
The Court: Mr. Witness, when an objection is made you must not answer the question.
Mr. McFarland: That would be a part of the plaintiff's case to show the fact that it could be done, it is a practical way to do it, and the other could not be done and that would have been an impractical way to do it. That is going back and making his case again in rebuttal.
The Court: The objection is overruled.
Mr. Curley: Would it be possible for a man to——
Mr. McFarland: Let me just ask him one question.

Q. What experience have you had, Mr. Bentley, in putting in angle irons?
A. Well, I have worked at the repair works since I have quit stationary engineering, about a year and a half at repair work, handling iron.
202 Q. In that particular line of work?
A. Sir?
Q. In placing angle irons?
A. All kinds of work.
Q. I mean that particular way, particular method, did you ever place any angle irons on a hopper yourself?
A. Yes sir.
Q. Where?
A. At the smelter.
Q. At Clifton?
A. Yes sir.
Q. Up on top of this feed-floor?
A. Yes sir.

Q. How many irons did you place?
A. Well, I couldn't say as to how many, but I have repaired, there, doing construction work, too.
Q. And you are quite positive that you have placed angle irons?
A. I have worked on them.
Q. By going into the hopper?
A. No, I couldn't say that I went in the hopper. It wasn't necessary for me to go into the hopper at the time I was working on them.
Q. Did you have any experience in placing those angle irons, by remaining on the feed-floor?
A. Sir?
Q. Did you have any experience in placing those angle irons by remaining on the feed-floor?
A. Yes sir, at various places.
Q. That is practicable then to do that?
A. Sir?
Q. It is practical then to remain on the feed floor and put those angle irons in the hopper?
A. To lay on the feed-floor, you say?
Q. To remain on the feed-floor and put angle irons in the hopper.
A. Well, there is places where you have got to get in all shapes and forms to get angle irons in a place like that.
Q. This particular hopper up there on that feed-floor?
A. I can't say that I worked on this particular hopper.
Q. You would not say it was not——
A. No sir.
Q. You would not say it was not practical to put an iron in that hopper from the surface of the feed-floor, would you?
A. I did not understand the question, sir.
Q. Would it be practical to put an angle iron on top of a hopper—that particular hopper and remain on the feed-floor while you were doing that work?
A. No sir; it would not.
Q. It would *nto* be practical to do that?
A. No sir.
Q. Would it be possible?
A. I don't see how a man could do it hardly.
Q. What is it?
A. I don't see how a man would do it.
Q. It is possible to do it?
A. No sir.

Mr. Curley:

Q. Mr. Bentley, if one of those hoppers was half-full of material of any kind, would it be possible to get that angle iron into the hopper through the opening?
A. It would not.

Mr. McFarland: Hold on, I wish the witness would obey the court's instructions.
The Witness: I did, but I was looking at the angle iron and look-

ing at this man. I did not speak before he asked the question, I believe.

203 Cross-examination:

By Mr. McFarland:

Q. Do you testify from your personal knowledge or as an expert that it is impossible for one to reach under a floor to the extent of eight inches with his hand? You testify it would be impossible to do that from the surface of the floor, put on that angle iron?

A. He is not reaching under there.

Q. One side of this floor, the distance from the surface back is eight inches. One the other side it is ten inches. Now do you testify as an expert or from personal knowledge that it would be impossible for one to put his hand under that floor ten inches on that side, or eight inches on this?

Mr. Curley: I object to the question inasmuch as there is no such testimony before the jury.

The Court: Objection overruled. The witness said he examined this place.

Mr. McFarland: The testimony was that that opening on one side was ten inches and on the other eight.

Mr. Curley: Mr. McFarland's question is "do you testify from your knowledge as an expert that a man could not put his hand in there eight inches." Mr. Bentley did not testify to that. He testified to the fact that a man could not put these irons in there—not that he couldn't put his hand in there eight inches.

The Court: I think the jury understand pretty well. He may answer if he can.

A. He couldn't; no sir.

Mr. Kearney:

Q. He wouldn't be able to see what he was doing in there, would he?

A. No sir.

Mr. McFarland: That isn't the question I asked him. That is not re-direct examination.

The Court: Stand aside.

Mr. Kearney: All right. That is all.

(Witness excused.)

JOSEPH B. HAMMER, the plaintiff, recalled to the stand in rebuttal, having been previously sworn, further testified as follows:

Direct examination.

By Mr. Kearney:

Q. Mr. Hammer, when you were treated at the hospital there by Doctor Smith, how long did that treatment, the manipulating and pulling of the fingers continue?

204 Mr. McFarland: Now, if your Honor please, that is not rebuttal. He testified to all that in his examination in chief, and we haven't introduced any evidence on it. We took the expert here, but this witness testified to the facts.

The Court: On what theory is that rebuttal?

Mr. Curley: To rebut the testimony of Doctor Butler that if certain things had been done he would have had a much better hand. He was asked the question, "now, Doctor, if within two or three months a certain treatment had been undergone, would he have had a much better hand." The doctor said "yes."

Mr. Kearney: We want to show what treatment he did undergo during that time.

Mr. McFarland: If the Court please, that isn't rebuttal. We have introduced no evidence as to how that hand was treated, except in the way of assumption to get the opinion of an expert—not the facts.

The Court: I will overrule the objection.

Mr. McFarland: Exception.

(Question read.)

A. My hand was treated until July the 2nd. The Doctor pulled these fingers just as hard as he could pull every day.

Mr. McFarland: Now, if your Honor please, has any evidence on the part of the defense gone in on that subject?

The Court: I think so.

Mr. McFarland: You think so?

The Court: Yes.

A. And also used the battery on this hand every day for over two months, and the hand wasn't improved any. I had to suffer quite a bit with it. This finger was pulled back until it was broken on both sides all the way around from here, (indicating) all the way around.

The Court: Now, Mr. Hammer, I think you are getting a little over the question that was asked you, and it isn't in rebuttal? What you were asked to do was to tell what treatment was given your hand.

Mr. Kearney: Just confine yourself to the treatment. What was done with your hand by the doctors.

The Court: Not what you suffered or anything of that sort, but just exactly what was done by the doctors?

A. Well, they put the electric battery on there in order to liven it up and get more looseness in the hand, and pulled these fingers, treated them every day to the best of their knowledge, and
205 that is the result. That is all I can say. I gave them a good show until July the 2nd.

Mr. Kearney:

Q. Mr. Hammer, you stated it was impracticable to put those angle irons in that hopper the way it was done, or required to be done—do the work from the outside without getting into the hopper.

Now, I wish you would tell the jury why that is so, your reasons for it.

A. It is necessary for——

Mr. McFarland: I object to that. He gave his reasons for it and testified to all that on his examination.

The Court: Objection sustained. I think the witness has gone thoroughly into that.

The Witness: The- don't——

Mr. Curley: Just a moment, Mr. Hammer.

Mr. McFarland: Mr. Hammer, just a moment, until the court has ruled.

The Court: I have ruled. I say I sustain your objection because it is not rebuttal.

Mr. Kearney:

Q. Did you hear Mr. Jones say that it is practical to do this work from the outside?

A. Yes sir.

Q. Is that correct or not

A. No sir.

Q. Why do you say no?

A. It is impossible to get the angle iron down through the opening, the way the angle iron is constructed there—impossible. I can prove it to you if I had the opportunity of doing so.

Mr. Kearney: I will ask to have the witness to illustrate, if the Court will permit him, to illustrate why.

Mr. McFarland: If the jury don't understand the situation, if it isn't clear to the jury I am perfectly willing that it should be done.

The Court: Oh, if you intended to have a hopper here in court you should have had it long ago, and I cannot now at this stage of the trial wait until you can make a design to illustrate that question before the jury. Then the defendant would be entitled to bring witnesses here and examine maybe a half dozen with reference to the particular design of construction before the jury, and we never would get through this case. I wondered during the trial why such an apparatus was not exhibited.

Mr. Kearney: No, I don't think the court exactly understood me. I may be mistaken in that. My purpose was—he said it would be impracticable to do it. Now it was simply to show, just a short illustration there, that he would be precluded from doing that by reason that he couldn't get the iron in there, and also on account of light.

The Court: If that is permitted, it opens up the case again, and they would have to bring their witnesses here.

206 Mr. Kearney: I don't wish to do that. I take it the court is right in the matter.

Q. Did you hear the testimony of the two Mexicans, the Provencio boys?

A. Yes sir.

Q. That they pulled you out of the hopper when you were burned up in there?

A. They never laid a hand on me, neither of them.
Q. They didn't help you out at all?
A. No.
Q. Who did assist you out?
A. Mr. Bentley and Mr. Nielson.
Q. Now, Mr. Nielson, Harry Nielson, was Mr. Nielson in charge of the work about the smelter?
A. Yes, he was under Mr. Fraser.
Q. Did Mr. Nielson at any time give you any instructions or directions?

Mr. McFarland: Well, now if the Court please, I remember particularly that he said that Mr. Nielson did not give him any particular directions or instructions, and he said further I remember distinctly, that he use- his own judgment in placing these angle irons. That is very distinct in my memory, I think. No, I asked upon cross-examination if Mr. Neilson took him up there and showed him particularly how to do this from the surface of the floor, and under no circumstances was he to get under the floor to attempt to perform this particular act, and he said no.

The Court: I sustain the objection because this witness was asked all about what took place between Mr. Nielson and himself.

Mr. Curley: That was upon cross-examination.

The Court: Well, it is immaterial, if he has made the statement.

Mr. Curley: This evidence has been put in since, and it is for the purpose of rebutting the evidence, what the witness has testified.

The Court: No, the predicate was laid by counsel for the defendant when this man was on the witness stand, and he was asked if Mr. Nielson did not do and say certain things, and this witness said no. Now, then, that testimony was introduced by the defendant in this case. I sustain the objection. I think this witness has told all that took place between Mr. Nielson and himself—statements that varied in detail.

Mr. Curley: Don't answer this question until the court has had a chance to rule upon it.

Q. Mr. Nielson has testified that he went on the feed-floor with the plaintiff, and standing above said hoppers in person showed the plaintiff (yourself) the safe and proper method of placing said angle irons without getting into the hopper. State whether Mr. Nielson did so go upon the floor and give you such instructions?

Mr. McFarland: I object because it is not rebuttal.

207 The Court: I sustain the objection because it is not rebuttal and because this witness has heretofore stated all that took place between himself and Mr. Nielson. As a matter of fact, I doubt very much whether you can impeach a witness whose statement is introduced in evidence, when he is not here.

Mr. Curley: Impeach a witness, you mean to contradict him?

The Court: Contradict the testimony when the witness is not given an opportunity of being present. I think the courts have so held. I am not sustaining the objection on that ground, but I know some of the——

Mr. McFarland: That is true, if your Honor please. We did not raise that objection.

The Court: I understand, but there is no question in my mind but what if you admit that a witness will testify, you do not admit it is true, of course, but you cannot impeach an absent witness. I know some of the courts have held that you cannot impeach an absent witness.

Mr. Curley: Not impeach.

The Court: That would be the effect of it.

Mr. Curley: Now, it would simply be testimony of a contradictory nature. That is all.

Cross-examination.

By Mr. McFarland:

Q. Now, Mr. Hammer, did you further hear Mr. Jones testify that Number 3 hopper had been repaired by placing angle irons in it similar to those that you placed in the one that you were injured in, and that the workmen remained on the top of the feed-floor while they did that work? Did you hear him testify to that?

A. Yes, I heard him testify to that effect.

Q. Well, now, what do you say to that? You heard Mr. Fraser testify to the same thing?

A. Yes, I heard Mr. Fraser, yes.

Q. What do you say to that testimony?

A. It is an impossibility to do it.

Q. What is it?

A. It is an impossibility to do it.

Q. Even if those two men swore that they did do it?

A. Yes, it is impossible, absolutely so.

Mr. McFarland: That is all.

The Court: Stand aside, Mr. Hammer.

(Witness excused.)

Mr. Curley: We rest.

(After being duly admonished, the jury was excused until 1:30 P. M.)

208 SATURDAY, November 27th, 1915—1:30 p. m.

Mr. McFarland: At the conclusion of all of the evidence and before the argument of counsel, the defendant moves the court to direct a verdict in this case in favor of the defendant.

First, because the evidence submitted would not sustain a verdict, or support a judgment in the case:

Second, because the evidence in the cause, in fact, all of the evidence in the cause, shows that if the plaintiff received any injury at the day and date alleged in his complaint, that such injury was the result directly and proximately of his own negligence;

Third, because the evidence in the cause shows by an overwhelming preponderance that a verdict on the cause of action as alleged in the complaint should be for the defendant.

The Court: The motion is denied, and the matter will be submitted to the jury.

Mr. McFarland: To which we except.

(Arguments of counsel.)

Gentlemen of the jury, this is an action brought by Joseph B. Hammer, the plaintiff against the Arizona Copper Company, to recover from the defendant the sum of $50,000 as damages for alleged personal injuries sustained by the plaintiff while in the employ of the defendant, said injuries having been sustained by the plaintiff at the time and place, and manner set forth in the complaint. The plaintiff's complaint and defendant's answer have both been read in your presence and hearing and I deem it unnecessary to again read them. You will recollect that, among other things, the complaint alleges in substance: that on or about December 28th, 1914, while the plaintiff was employed as a skilled workman in making repairs and improvements on a hopper on the feed-floor of the defendant's smelter at Clifton, Arizona, which said hopper was situated immediately beneath a standard-gauge railroad track over which electrically propelled cars filled with hot calcine were operated—and while the plaintiff was exercising due care for his own safety, and without any negligence on his part, a car so propelled on said track, and loaded with hot calcine, on arriving at the section os said track immediately above the hopper which the plaintiff was repairing, as aforesaid, and without warning to the plaintiff, discharged a large quantity of its contents and the sulphur fumes therefrom upon the body of the plaintiff; that as a direct result of the foregoing accident, which it is alleged was due to a condition or conditions of plaintiff's employment, the plaintiff suffered great physical pain and mental anguish; his head, the region of his neck, his right hip, both his right and left arms from the shoulder down and his left leg from the groin to the top of the foot *was* severely burned; and he was sickened and stifled by said sulphur fumes. That as a direct result of said burns, plaintiff's left arm is weakened; his left hand and the fingers thereof rendered useless; his right hip and left leg severely injured; he is greatly disfigured, scarred and crippled; and permanently disabled and incapacitated from following his usual vocation of boiler-maker, and from performing any manual labor requiring the use of his left hand and the fingers thereof.

209 The foregoing, gentlemen, recites in substance certain portions of plaintiff's complaint, and I would have you clearly understand that I have not stated and am not now attempting to state to you, the facts of the case as proved here at the trial. What I have just stated is the substance of the allegations set forth in plaintiff's complaint, and what he claims were the facts.

The defendant in its answer denies that said injury or injuries were of the nature or extent as set out in plaintiff's complaint. It denies all and singular, each and every other material allegation of plaintiff's complaint, and avers that if plaintiff was so injured, as

alleged in the complaint, it was by reason of plaintiff's own carelessness and negligence.

This action is brought by virtue of the laws of the State of Arizona, by virtue of Chapter 6 of Title 14, Civil Code, Revised Statutes of Arizona, 1913, entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations", commonly called and generally known as the "Employers' Liability Act". Under the provisions of this Act an employer in certain hazardous occupations—among them ore-reducing or smelting— is liable for the personal injury of an employee by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, in all cases in which such injury of such employee shall not have been caused by the negligence of the employee injured, and in such case the employer is liable even though he, himself, be wholly free from any fault or negligence. I say, under such conditions as I have stated to you, the employer is liable even though he himself be wholly free from any fault or negligence, provided, of course, that the injury of the employee shall not have been caused by his own negligence.

I charge you, as a matter of law, that the occupation of plaintiff on December 28th, 1914, if he was so employed, in or about defendant's reduction works, or smelter, is a hazardous occupation within the meaning of the said Arizona Employers' Liability Law.

It devolves upon the Court to state to you the law governing this case. If I state the testimony, I shall do it for the purpose of calling your attention to it and stating its tendency. If I intimate an opinion on a disputed question of fact, you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are.

While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole, and not give undue importance to minor points or portions of the evidence taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all of the evidence, direct and circumstantial, as well as documentary evidence in the case.

I charge you that you are made by law the sole judges of the facts in this case, and the credibility of each and all of the
210 witnesses who have testified in the case, and of the weight you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of any witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have, if shown, and the probability or improbability of the truth of his statements when considered in connection with the other evidence in the case. And in that connection, I charge you that the legal presumption is that witnesses speak the truth,

but this is but a prima facie presumption, and may be repelled by the testimony and the demeanor of the witnesses.

Under the law all races stand equal when introduced upon the witness stand, and there is no distinction made as to the presumption that the witness speaks the truth because of race or color. You are, however, the sole judges of the credibility of the witnesses, and you may, and should, take into consideration the intelligence of the witness, his understanding of the language used to him, and if he speaks through an interpreter, the difficulty of accurate translation, if, in your opinion, any such difficulty exists. And in this connection, you may take into account your knowledge of the difference in the vocabulary of the two races, if such exists.

If you believe that any witness has wilfully sworn falsely to any material fact in the case, then you have the right to wholly disregard the testimony of such witness except insofar as his statements may be corroborated by other credible evidence in the case, and by the facts and circumstances proven in this case. It will be your duty in arriving at a verdict in this case to be governed by the evidence which has been introduced before you, and the law as herein given you, regardless of the condition of parties hereto financially, or of the effect of your verdict upon the parties, or either of them. You are to look at the evidence in this case in a common-sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

I charge you that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the material allegations of his complaint, and if he has failed to do so, he cannot recover. By a preponderance of the evidence, I mean the greater weight of the evidence. It does not necessarily mean that a greater number of witnesses shall be produced upon one side or the other; it means the more convincing force, or the greater probability of the truth of the evidence on one side when compared with, or weighed against, the evidence in opposition. By burden of proof, wherever used in these instructions, is meant this: that the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence, as I have heretofore defined that term to you.

The first question to be presented to you for your consideration and determination is whether the plaintiff, Hammer, at the time and place mentioned in the complaint, and while in the service or employment of the defendant, and in the course of his labor, received the injuries, or any of the injuries, therein described;
211 that is, described in the complaint. If you answer this in the affirmative, that is, the plaintiff in the course of his labor, and while in the service or employment of the defendant, received the injuries complained of, then you will determine whether such injuries so received by the plaintiff were due to a condition or conditions of his occupation or employment, and if you believe from the evidence in this case that the plaintiff was so injured, and that

such injuries were suffered or caused by an accident arising out of such labor, service or employment, and that the same were due to a condition or conditions of such occupation or employment, then you must consider and determine whether or not such injuries were caused by the negligence of the plaintiff, Hammer, because, if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action and your verdict must be for the defendant. I say, gentlemen, if you come to this conclusion, that is, that the injuries alleged in the complaint to have been sustained by the plaintiff, or any of them, were caused by the plaintiff's own negligence, then he, the plaintiff, cannot recover in this action, and you need not go any further, in the case. You stop right there and return a verdict for the defendant.

Now the word "negligence" has been used a number of times in argument and in these instructions. By negligence is meant the want of reasonable and ordinary care which under the same conditions and circumstances would be exercised by a person of ordinary prudence and foresight. Negligence may consist of an act or of failure to act. It is therefore such an act that a person of ordinary care under existing conditions and circumstances would not do, or such a failure to do something which, under the existing conditions and circumstances, a person of ordinary care would have done:—As the Supreme Court of the United States has said:—"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. The essence of the fault may lie in omission or commission—the doing or the failure to do. The duty is dictated and measured by the exigencies of the occasion." In no event can the plaintiff recover unless he has established by a preponderance of the evidence that the alleged injuries sustained by the plaintiff were not caused by his own negligence and therefore, if you believe from the evidence that the plaintiff's injuries were caused by his own negligence, or if the plaintiff has failed to establish by a preponderance of the evidence that the injuries complained of, if any, were not caused by his own negligence, then your verdict must be for the defendant.

You are instructed that if the plaintiff in this action negligently placed himself in such a position that injury resulted to him, and but for such negligence the injury would not have occurred, he cannot recover in this action and your verdict should be for the defendant.

You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupa-
212 tion. If you are satisfied from the evidence in the case that the accident and resulting injury were due to a condtiion or conditions of such occupation, while plaintiff was in the service of the defendant in such hazardous occupation, yet the plaintiff would

not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfied you that said accident and injury were not caused by the negligence of the plaintiff.

Where there are two ways of discharging a service apparent to the employee, one dangerous and the other safe, or reasonably so, the employee must select the apparently safe way, whether or not it is less convenient to him, and if he chooses the dangerous way, and the danger is such that a reasonably prudent person would not incur the risk under the same or similar circumstances, he is guilty of such negligence as would bar recovery, and your verdict will be for the defendant.

Now, gentlemen, if you find from the testimony that plaintiff, at the time and place mentioned in the complaint sustained any of the injuries set out in the complaint, and that such injury or injuries were not caused by, or were not the result of plaintiff's own negligence, you will next consider and determine the nature and extent of said injuries so sustained.

I have already stated to you that the defendant in its answer denies that the injuries so sustained by the plaintiff were of either the nature or the extent as set out in the complaint. This is a point for you, the jury, to determine—the nature and extent of the injuries, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them are the proximate result of said accident. All of the injuries, defects and afflictions for which you award damages to the plaintiff, if you award damages, must by a preponderance of the evidence be shown to have been sustained as a natural and proximate result of said accident; and, of course, plaintiff cannot recover for any injuries other than those shown to have been sustained at the time and place mentioned in the complaint.

Before I proceed further, gentlemen, I perhaps should state that if the plaintiff has sustained the injuries under the conditions which I have heretofore stated, while in the service of the employer, and that it was due to a condition or conditions of such service or employment, the question as to whether or not the employer—the company—was negligent is not a material question in this case, because if the injuries, or some of them, were so received under such circumstances, and if the plaintiff himself was not guilty of negligence, then, as I have heretofore told you, the defendant is liable notwithstanding the fact that the defendant—the company—was guilty of no fault or negligence whatever.

As above stated, you are made the sole judges as to the extent or degree of the injuries, if any, so sustained: that is, as to whether or not they are permanent in character; and as to what extent, if any, by reason of such injuries, plaintiff has suffered mental
213 or physical pain and anguish, or both; also as to what extent, if any, he has been, by reason of such injuries, disfigured, scarred, crippled, and to what extent, if at all, by reason of such injuries so sustained he has been disabled and incapacitated from following his usual vocation as described in the complaint, and

from performing any manual labor requiring the use of his left hand and of the several fingers and thumb thereof, or any of them; and as to whether or not this incapacitation, if any, is permanent or merely temporary. All of these points, gentlemen, go to make up the nature and extent of the plaintiff's alleged injuries, and should you award the plaintiff damages in any amount, it is your duty to consider each and every one of these points as a factor in computing the award. If you award damages to the plaintiff in this case, in addition to the factors that I have just mentioned, you will also make due and adequate allowance for the reasonable value of time lost by the plaintiff as a result of said injury or injuries from December 28th, 1914, to this date. I say, that, in addition to the other compensation.

In the ascertainment of damages the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is now fifty-one years of age, and testimony has been received for the purpose of showing that the probable duration of the life of a person fifty-one years of age is 20.2 years. This testimony was based upon the American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons, but it has been held that the rules to be derived from such tables may not be the absolute guides of the judgment and conscience of a jury in a case of this character. It may, however, be considered by you in connection with all the other evidence in the case. As above stated, if you find for the plaintiff, you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted,—his condition of health, and all the contingencies to which it was liable; such award or compensation not to exceed in any event the amount claimed in plaintiff's complaint.

The court instructs you that if you find that plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor, and without passion and prejudice, what amount of money would reasonably recompens*ate* him for the damages, if any, he has sustained.

If you find for the plaintiff in this case, under the instructions given by the court, and that the plaintiff has sustained damages as set forth in his petition or complaint, then to enable you to estimate the amount of damage, it is not necessary that any witness should have expressed an opinion as to the amount of such damage,
214 but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observations and experience in the ordinary, everyday affairs of life.

If, under all the facts in this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, if he has sustained any, you must not render what is known as a "quotient verdict"—that is, you must not add together the amount of the sums which each of you believe the plaintiff is entitled to, and divide by twelve, or any other number. Such or any similar method of arriving at plaintiff's compensation, would be unlawful, and the court would be compelled to set aside the verdict.

Now, gentlemen, you have heard all the facts in this case and the argument of counsel, and it is for you to pass upon the facts under the instructions which I have given you. If you find for the plaintiff the form of your verdict will be: "We, the jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find for the plaintiff and assess his damages at — Dollars," inserting the amount which you determine should be awarded to him. If you find for the defendant, the form of your verdict will simply be: "we, the jury, duly empanelled and sworn in the above entitled cause, upon our oaths, do find for the defendant." Cause your foreman to sign the verdict which represents your conclusions and return it into court.

Mr. Kearney: I have none.

The Court: Any exceptions on the part of the defendant?

Mr. McFarland: Will the court allow us an exception?

The Court: Yes.

Mr. McFarland: Now, will your Honor furnish me with the draft of the instructions asked by the defendant and refused?

The Court: You may have an exception to all requested instructions.

Mr. McFarland: I will have to list them in some way so that they can be identified. Our instructions number, 1, 2, 3, 4, 5, 6, 7——

The Court: If you will just give me an opportunity to answer your question.

Mr. McFarland: Yes sir.

The Court: I say you may have an exception to the refusal of the court to give any of the requested instructions on behalf
215 of the defendant—any that may have been refused.

Mr. McFarland: Now, may the record show that in the presence of the court and before the jury retired to consider of their verdict that these instructions were requested and denied, and exceptions were duly taken by the defendant.

The Court: Yes, the record may so show.

Mr. McFarland: Also as to the other instruction I asked the court to charge the jury.

The Court: You may have an exception to that also.

Mr. McFarland: The rules of the Supreme Court require that shall be done.

The Court: Yes, I realize that the rules do require that, and you may have an exception.

(The jury retired in charge of a bailiff, duly sworn, to consider of their verdict.)

Certificate.

I, H. C. Nixon, do hereby certify that I was present at the trial of the foregoing case, on Wednesday, Nove. 24th, Friday, Nov. 26th and Saturday, Nov. 27th; that I took down in shorthand all the testimony introduced and proceedings had during the course of the said trial; that I have transcribed said shorthand notes into typewriting, and that the foregoing one hundred and seventy-eight pages of typewritten matter contain a full, true and correct transcript of the shorthand notes so taken by me, and all the oral testimony of the various witnesses; all offers of documentary evidence, offers of proof, objections and exceptions made or taken by counsel; and all remarks, rulings and instructions given or rendered by the presiding judge, during the trial of the above-entitled case

Dated at Tucson, December 21st, 1915.

H. C. NIXON,
Court Reporter.

216 And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

Be it further remembered, that during the trial of this cause the following proceedings among others were had:

I.

Joseph B. Hammer being on the witness stand and having duly sworn as a witness for the plaintiff was asked by plaintiff's counsel the followin- question:

P. 10:

"Q. In the vocation which you follow, as a boiler-maker and iron-worker, what wages do they pay you a day?"

"A. It was fifty cents an hour up to the time they made the reduction, and they brought us down to $3.60; forty-five cents an hour."

"Q. Well, before this at other places, did you receive that much wages or more?"

To which last said question witness was permitted over defendant's objection to answer:

"I received more."

Defendant objected to said question before said witness answered, upon the ground that what wages plaintiff received at places other than where he was working at the time of his alleged injury, is wholly incompetent, irrelevant and immaterial, for the reason that it does not in a proper manner states or tend to fix the standard of plaintiff's earning capacity. That the court overruled defendant's objection to said question to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

217

II.

Joseph B. Hammer being on the witness stnd and having been duly sworn as a witness for the plaintiff was asked by plaintiff's counsel the following question:

P. 12:

"Q. What are the prevailing wages, say in Greenlee County at the present time for the class of work that you were performing at the time you were injured."

To which question said witness was permitted over defendant's objection to answer:

"A. The prevailing rate, the scale, as the boiler-makers call it, is $4.72 for eight hours. I also know of one instance where a man is getting $4.80."

Defendant objected to said question before said witness answered upon the ground that the particular wage scale in Greenlee County at the present time is wholly incompetent, irrelevant and immaterial, for the reason that it does not in a proper manner state or tend to fix the standard of plaintiff's earning capacity. That the court overruled defendant's objection to said question, to which ruling of the court, defendant then and there excepted and still excepts, which said exception was allowed.

III.

Estanislado Provencio being on the witness stand and having been duly sworn as a witness for the defendant, was asked by plaintiff's counsel on cross-examination the following questions:

P. 95-96:

"Q. Then if the door there, as it should have been, was properly closed, that car would have passed over where Mr. Hammer was at work without injuring him any—wouldn't have burned him, because no calcine would have poured down; isn't that true?"

"Q. If the slide-doors on that car had been closed, the car would have passed over where Mr. Hammer was at work and wouldn't have burned him any?"

218 To which last said question witness was permitted over defendant's objection to answer:

P. 96:

"A. No sir."

"Q. If the slide-doors on that car that let the calcine out had been closed, then that car would have passed over the hopper where Mr. Hammer was at work and none of the calcine would have emptied into that hopper?"

"A. But the doors were closed."

"The Court: That isn't an answer to the question, if the doors had been closed would the calcine have been dropped out, run out?"

To which question said witness was permitted over defendant's objection to answer:

"A. No, it wouldn't have leaked out."

Defendant objected to said questions before said witness answered for the reason that evidence as to whether the door on the car was opened or closed was incompetent, irrelevant and immaterial for the reason that in attempting to show that the door on the car was open, plaintiff attempted to fix negligence in the premises, upon this defendant. Plaintiff's cause of action was solely predicated upon the Employers' Liability Act of this State, and for an injury which arose out of the condition or conditions of the employment, while he was engaged in a particular employment in which he had hired, in which evidence the question of the negligence of the employer or the defendant herein is wholly incompetent, irrelevant and immaterial.

IV.

George W. Fraser being on the witness stand (p. 102-104) and having been duly sworn as a witness for the defendant testified to and regarding a certain blue print map, which defendant presented and had marked for identification by the Clerk as de-
219 fendant's exhibit —, which said blue print map this defendant then offered in evidence, to the introduction of which said map, plaintiff then objected, which said objection was by the court sustained, to which ruling of the court defendant then and there excepted and still excepts, which said exception was allowed.

That the purpose of the introduction of said map was to show exactly and in detail by the drawings thereon, the site and location of the place at defendant's smelter where plaintiff alleges he was injured.

Defendant offered to prove by said witness who was then able, willing and ready to so testify, that said blue print map was correct in all details pertaining to this cause.

V.

Elmer Bentley being on the witness stand and having been duly sworn as a witness for the plaintiff in rebuttal was asked by plaintiff's counsel the following questions:

P. 160:

"Q. Mr. Bentley, do you know Mauro Provencio, the young fellow that testified he was a helper to Mr. Hammer at the time he was injured?"

"A. Yes sir."

"Q. Immediately after Mr. Hammer's injury did you have any conversation with him as to why the boy operating the car did not stop the car before it ran over the hopper?"

To which said question said witness was permitted over defendant's objection to answer:

"A. I did. Yes sir."

"Q. What did he say?"

"A. He said——

"The Court: Now you will have to put the same question to him that you put to the other witness."

220 "Q. Did you then state, or did you then ask this Mauro Provencio a question similar to this: 'What was the matter with the fellow (referring to the motorman) that he didn't stop the car?' "

To which last said question witness was permitted over defendant's objection to answer:

"A. I did."

"Q. And did he not then say to you——

"The Court: Did he or not then say to you——

Mr. Curley:

"Q. The brakes wouldn't work, the fellow said," of words of that import?

To which last said question said witness was permitted over defendant's objection to answer:

"A. He did: He says the brakes was no good."

"The Court: The latter part of his answer is stricken out." "His answer he did, is allowed to stand. The objection is overruled."

That defendant objected to said question before said witness answered in each case, upon the ground that plaintiff's cause of action was solely predicated upon the Employers' Liability Act of this State and restricted solely to a recovery for injuries due to an accident due to a condition or conditions of plaintiff's occupation as defined in said act. That said questions and answers sought to charge this defendant with negligence in the operation of the car, and with negligence in furnishing proper appliances in proper condition a safe place to work, for which reason said evidence was incompetent, irrelevant and immaterial.

221 VI.

That upon motion of plaintiff (p. 24-26) and over the objection of this defendant, plaintiff was permitted by the court to amend his complaint, by adding thereto an additional injury and result to plaintiff on account of his alleged injury, of injury and damage to the stomach of plaintiff. That the court overruled the objection of defendant to such amendment, to which ruling of the court the defendant then and there excepted and still excepts, which said exception was allowed.

That said application and motion to amend plaintiff's complaint in the particular above mentioned, was not made or suggested until the trial of the cause had begun, and coming at such time came too late.

VII.

That at the conclusion of all the evidence in the case, (p. 171) and before the court had instructed the jury and before the jury had retired to consider of their verdict, the defendant moved the

court that a verdict be directed in behalf of this defendant on the following grounds:

First. Because the evidence submitted would not sustain a verdict or support a judgment in the case.

Second. Because the evidence in the cause, in fact, all of the evidence in the cause, shows that if the plaintiff received any injury at the day and date alleged in his complaint, that such injury was the result directly and proximately of his own negligence.

Third. Because the evidence in the cause shows by an overwhelming preponderance that a verdict on the cause of action as alleged in the complaint should be for the defendant.

That the court overruled and denied defendant's said motion for a directed verdict, to which ruling of the court, defendant then and thre excepted and still excepts, which said exception was allowed.

222 VIII.

That the defendant requested in writing and the court refused to give to the jury the following instructions:

"If the jury believe from the evidence that plaintiff was instructed by defendant that the proper and safe method to place the angle irons on the top of the hopper or hoppers was to place same from the top of the feed floor and that plaintiff failed and refused to pursue the method directed by defendant and voluntarily adopted the method of placing said angle irons by getting down into the hopper, and the method selected by him in any way caused or contributed to the accident and injury as alleged in his complaint, then I charge you plaintiff cannot recover."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which said plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

IX.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"The law imposes upon every person the duty of using ordinary care for his own personal protection against injury; this is what the courts mean when they say contributory negligence will defeat a recovery."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

223 X.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"I charge you that what the law means by "Contributory Negligence" is a want of ordinary care on the part of the person injured, which contributed in any degree to the injury, and without which the injury would not have happened, and that such act or omission was not such an one as would have been done or omitted by a person of ordinary prudence under the same or like circumstances, than I instruct you, that the plaintiff cannot recover and your verdict should be for the defendant."

To which action of the court, in the presence of the court and before the jury retired to consider of their verdict, defendant then and there excepted and still excepts upon the ground that in an action brought under Employers' L[illegible]ity Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recover-; and that the court should have so stated the law to the jury.

XI.

That the defendant requested in writing and the Court refused to give to the jury the following instruction:

"You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupation. If you are satisfied from the evidence in the cause that the accident and resulting injury were due to a condition or conditions of such occupation, while plaintiff was in the service of defendant in such hazardous occupation, yet plaintiff would not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfies you that said accident and injury were not due in any degree to the negligence of the plaintiff."

To which action of the court, in the presence of the court, and before the jury retired to consider of their verdict, defendant
224 then and there excepted and still excepts upon the ground that in an action brought under Employers' Liability Act, contributory negligence of a plaintiff employee, which in any degree contributes to the accident and injury on which such plaintiff employee seeks recovery, is a bar to such recovery; and that the court should have so stated the law to the jury.

Be it remembered that during the trial of this cause the further proceedings were had:

L. Kearney, Esq., attorney for plaintiff herein, in his closing argument before the jury and while discussing the evidence in the cayse said, even if Hammer had remained in the hopper and refused to get out as claimed by the defendant, nevertheless, Hammer

would not have been injured if the car had been in proper condition and if it had not been for the negligence of the defendant in running the car over the hopper and spilling the calcine on him, or words to that purport and effect. To which remarks of counsel defendant then and there objected.

That the court erred in refusing to withdraw said remarks from the jury or in refusing to admonish the jury to disregard said remarks. To which action of the court, defendant then and there excepted, which exception was allowed by the court.

That defendant objected to the foregoing remarks and conduct on the part of counsel for plaintiff upon the ground that in an action of this character under said Employers' Liability Act brought for injuries received, the negligence of the defendant is not an issue and that the only recovery which may be had by a plaintiff employee under said act, is for injury or injuries received, due to any accident arising out of and in the course of the labor, service
225 and — of such plaintiff employee, and due to a condition or conditions of such occupation or employment; and upon the further ground that at the time the issues in this cause were joined, plaintiff avowed in open court that the recovery sought herein by plaintiff, was one by virtue of the provisions of said Employers' Liability Act, and not one by virtue of the general law for negligence of the defendant in the premises.

Respectfully submitted,

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant.

Settled and allowed this 4th day of March, 1916.

W. H. SAWTELLE, *Judge.*

Endorsements: In the United States District Court in and for the District of Arizona. Joseph B. Hammer, Plaintiff, vs. The Arizona Copp-r Company, Limited, a corporation, Defendant. No 39 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. Received copy of within Defendant's Proposed Bill of Exceptions, this 1st day of March, A. D., 1916. Frank E. Curley, Attorney for Plaintiff. W. C. McFarland, H. A. Elliott, Attorneys for Defendant, Clifton, Arizona.

226 In the United States District Court in and for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Defendant's Proposed Bill of Exceptions.

Be it remembered, that heretofore, to-wit: on the 8th day of January, 1916, and within the time allowed by law and rule of court, defendant above named, presented, served and filed its petition for new trial of the above entitled cause, and among other grounds for said petition represented as follows:

That defendant was surprised during the course of the trial herein by the testimony of Joseph Hammer, the plaintiff, and Elmer Bentley, a witness called by said plaintiff, in this; viz:

That said plaintiff and said Bentley testified in behalf of plaintiff that it was impossible to place the angle irons in the hopper in which plaintiff was working at the time of his injury, by plaintiff's remaining on the feed floor above and about said hopper; that it was impossible to so place said angle irons from above said hoppers by reaching down and within the same; that it was impossible
227 to do the work plaintiff was instructed to do without going down into said hopper.

That this defendant did not and could not anticipate that plaintiff and the said Bentley would so testify. That defendant could not within a reasonable time prior to the trial of this cause, if it had anticipated such testimony, have prepared to meet, contradict or ascertain the truth of such testimony for the following reasons:— That from and after the 11th day of September, 1915, and continuously to the present time, a strike has been and now is in progress in the District wherein defendant operates its smelter, whereat plaintiff sustained his injuries and that by reason of said strike, defendant has been compelled to shut down and cease operations in its said smelter; which said condition has continued from said 11th day of September, 1915. Defendant was compelled for the safety of its property to give over and transfer its custody of the same, including said smelter, to the Sheriff of the County of Greenlee, State of Arizona. That during the times herein mentioned, defendant has not been permitted by persons striking against defendant and guarding and patroling said smelter to employees or other agents in and upon said premises for the purpose of performing any work for defendant. That for this reason it was impossible for defendant within a reasonable time before the trial herein, to send any person or persons into said smelter for the purpose of ascertaining by actual experiment, if it were possible or impossible to put in place the angle iron on which plaintiff was working at the time of his injury, without going into the hopper. That it

would have been dangerous to the personal safety of any person or persons to have attempted such work and experiment at any
228 time from said 11th day of September, 1915, to the day of the trial herein, and for a considerable time thereafter.

That on the 5th day of January, 1916, this defendant believing that conditions had so changed as to permit said work being accomplished and without danger to the workers, directed one George W. Fraser, A. B. Jones, and W. C. Marshall to go to said smelter, and perform the actual experiment of placing the same angle iron in the same hopper, used and worked in by the plaintiff at the time of his injury. That the said Fraser, Jones and Marshall on last said date went to said smelter and performed said experiment and work. That said Fraser, Jones and Marshall took said angle iron and put the same in place in said hopper, without at any time going down and into said hopper; that they and each of them remained upon said feed floor and put said angle iron in place from above said hopper; that the result of said work so done was workmanlike, and in full compliance with the instruction plaintiff has testified as given him by his foreman upon undertaking said work. That should this motion be granted the said Fraser, Jones and Marshall will testify to the above facts and will be and appear upon due notice at any trial of the cause, and give such testimony, and testify that it is possible to place such angle iron in such hopper, without going into the hopper at all and that the same can be so done as to make a workmanlike job, and give a tight fit, as claimed to be required by said plaintiff, and will further testify that they and each of them have in person so done such work, using the angle iron and hopper used by plaintiff at the time of his injury.

229 That defendant files herewith, photographs and sworn affidavits of George W. Fraser, A. B. Jones and W. C. Marshall in support of the foregoing statements.

That the defendant has come into possession of, and in event this petition is granted, will be able to produce and will produce newly discovered evidence since the trial of this action and material to defendant, and which defendant could not with reasonable diligence have discovered and produced at said trial. That prior to said trial this defendant used every available means to discover all witnesses to the accident and injury of this plaintiff and sought out and interviewed all persons having such information and knowledge known to this defendant; that said newly discovered evidence is supported by the affidavit filed herewith of George W. Fraser, general foreman of repairs of this defendant at its smelter, and is as follows:

(*a*) That one T. M. Vaughn of the Town of Clifton, County of Greenlee, State of Arizona, is prepared to testify and will testify upon any trial or re-trial of this cause, that he, on the evening of the day on which plaintiff received his injuries, had a conversation with Elmer Bentley who was called as a witness for the plaintiff on the trial herein, in which conversation the said Bentley stated to the said Vaughan that a man had got badly burned at the smelter on that day, saying that the man so injured was Hammer the plain-

tiff herein and that the said Bentley further stated to the said Vaughan that the damned old fool (meaning Hammer) was told to get out and that he, the said Hammer refused to get out on account of its being a tight place and hard to get out of and into.

230 (*b*) That Elizabeth Vaughan, wife of the said T. M. Vaughan was present at the said conversation between the said T. M. Vaughn and the said Elmer Bentley, referred to and described in paragraph (*a*) immediately preceding. That the said Elizabeth Vaughan is prepared to testify and will testify at any further trial or re-trial of this cause to the facts and statements of said conversation hereinabove mentioned.

(*c*) That one Estanislado Sierra is prepared to testify and will testify upon a further trial or re-trial of this cause that upon the day of Plaintiff's injury he was a helper of the said Elmer Bentley a witness called on behalf of plaintiff at the trial herein and that as such helper he was working for this defendant on the top of No. 1 furnace immediately below the feed floor and below the hopper in which plaintiff was working at the time of his injury, and that at such place and while so working, said Estanislado Sierra heard the helper assisting the plaintiff herein say to plaintiff "get out of there Joe, the car is coming" and that the plaintiff herein replied to said helper, "Tell him to come on." That the said Estanislado Sierra then saw the said plaintiff raise his hand and make a motion to his helper for the car to come on.

(*d*) That one Harry Neilson is prepared to testify and will testify upon a further trial or re-trial of this cause that he on the day of the injury to plaintiff was foreman of repairs in the employ of this defendant at its smelter near the Town of Clifton, County of Greenlee, State of Arizona; that at the time of the injury to this plaintiff he, the said Harry Neilson was standing back of No. 1 furnace with Elmer Bentley a witness called by the plaintiff at

231 the trial herein; that at such time and place said Harry Neilson and the said Bentley were discussing the work for the day and that neither said Harry Neilson nor the said Bentley had any knowledge of any injury to or of the imminence of any danger to the said plaintiff until they heard plaintiff call for help; that the said Neilson will further testify that the said Bentley could not honestly and truthfully testify that the car which ran over the hopper in which Hammer was injured did not stop after it came upon the feed floor, and before it passed over said hopper for the reason that the said Bentley at such time as the car was passing over and along said feed floor and over said hopper was engaged in said conversation with said Neilson and was paying no attention to what was going on upon said feed floor. That the said Harry Neilson will further testify that the helper of Hammer was the first man to get to and assist Hammer after his injury, out of the hopper in which he was working and that the said Hammer the plaintiff herein was out of hopper and lying on the feed floor when the said Bentley first got to him after plaintiff's injury and that the said

Bentley said to said Neilson after the injury to the said Hammer, "I don't see how he ever got out. When I got upon the feed floor I thought the car had run over old Joe, the way he was laying on the feed floor."

That defendant herewith files affidavits of the said new witnesses, T. M. Vaughan, Elizabeth Vaughan, Estanislado Sierra and Harry Neilson, to the effect that they and each of them will give the testimony herein represented.

232 Be it further remembered, that together with the presentation and filing of said petition for new trial to sustain the issues thereof, on the part of defendant, the following affidavits were presented and filed:

In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

T. M. Vaughan, being by me first duly sworn according to law on oath deposes and says:

That he now is and has been for more than two and one-half (2½) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that he is well acquainted with and has known for the two years last past, Elmer Bentley of the said Town of Clifton; that this affiant and said Elmer Bentley during the year 1914 were close neighbors residing in what is known as "North Clifton" in said Town of Clifton; that affiant knows said
233 Elmer Bentley was during said year 1914 and for some time thereafter, in the employ of The Arizona Copper Company, Limited, as a repairman at said Company's New Smelter, situate near the said Town of Clifton; that this affiant knows Joseph B. Hammer, the defendant above named; that affiant knows of said Joseph B. Hammer's having been injured at said New Smelter by sustaining certain burns, and that on the evening of the day on which the said Joseph B. Hammer sustained said injury, the said Elmer Bentley came to the home of this affiant in said North Clifton and talked with affiant concerning the said injury of the said Hammer; that the said Bentley at last said time and place said to affiant, referring to said injury of said Hammer, "There was a man got badly burned out at the Smelter today"; that affiant asked the said Bentley how it happened and he started in to explain that it was done by hot calcine, and that he (meaning the said Hammer) was repairing a hopper under the track. He (Bentley) said the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place

and hard to get out of and into; that said Elmer Bentley told affiant at said time and place that the man so hurt and injured was Joseph B. Hammer, a boilermaker working at said New Smelter; that the said conversation with the said Elmer Bentley took place in the presence of Elizabeth Vaughan, wife of this affiant, further affiant saith not.

T. M. VAUGHAN.

Subscribed and sworn to before me this 4th day of January, A. D., 1916.

[NOTORIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My Commission expires Dec. 31, 1916.

234 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

Elizabeth Vaughan, being by me first duly sworn according to law on oath deposes and says:

That she is the wife of T. M. Vaughan, and that she now is and has been for more than two and one-half (2½) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that she is acquainted with and has known for some time past, Elmer Bentley of the said Town of Clifton; that this affiant and her said husband, T. M. Vaughan and said Elmer Bentley during the year 1914 were close neighbors residing in what is known as "North Clifton" in said Town of Clifton; that affiant knows said Elmer Bentley was during said year 1914 and for some time thereafter, in the employ of The Arizona Copper Company, Limited, as a repairman at said company's New Smelter, situate near the said Town of Clifton; that this affiant knows who Joseph B. Hammer is, the defendant above named; that affiant knows of said Joseph B. Hammer's having been injured at said New Smelter by sustaining certain burns, and that on the evening of the day on which the said Joseph B. Hammer sustained said injury, the said
235 Elmer Bentley came to the home of this affiant and her said husband in said North Clifton and talked with her said husband in the presence of this affiant concerning the said injury of the said Hammer; that the said Bentley at last said time and place and in the presence of affiant and her said husband, referring to said injury of said Hammer. "There was a man got badly burned out at the Smelter today." That affiant's said husband

asked the said Bently how it happened and he started in to explain*t* that it was done by hot calcine, and that he (meaning the said Hammer) was repairing a hopper under the track. He (Bentley) said the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place and hard to get out of and into; that said Elmer Bentley said in the presence of affiant at said time and place that the man so hurt and injured was Joseph B. Hammer, a boilermaker working at said New Smelter; that the said conversation with the said Elmer Bentley took place in the presence of this affiant and her husband, the said T. M. Vaughan, further affiant saith not.

ELIZABETH VAUGHAN.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTORIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My Commission expires Dec. 31, 1916.

236 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

W. C. Marshall, being by me first duly sworn according to law on oath deposes and says:

That he is fifty-six (56) years of age; is now and has been for twelve (12) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona; that for eight (8) mont*sh* prior to the 11th day of September, 1915, he was in the employ of the Arizona Copper Company, Limited, the defendant above named, at its New Smelter, in the capacity of mechanic in general repairs, in and about said Smelter.

That on the 5th day of January, 1916, affiant in company with George W. Fraser, A. B. Jones, and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said Smelter of said defendant, situate in the said Town of Clifton and at said Smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad g*uag*e track; that at last named point affiant assisted the said Jones and the said Fraser in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space

of two and one-fourth (2¼) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle iron are to prevent the overflow of
237 ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That this affiant sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and allowing his feet to hang in said hopper, reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while this affiant was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said Jones working with this affiant to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That this affiant sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon the said Jones assisting this affiant screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time in
238 the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than allowing his feet to hang therein while sitting on the feed floor as herein above described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

W. C. MARSHALL.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTORIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My Commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

A. B. Jones, being by me first duly sworn according to law on oath deposes and says:

239 That he is forty-two (42) years of age; is now and has been for about two (2) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona, that for about seven (7) months prior to the 11th day of September, 1915, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at its New Smelter, in the capacity of General Reverberatory foreman in and about said Smelter.

That on the 5th day of January 1916, affiant in company with George W. Fraser, W. G. Marshall and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said Smelter of said defendant, situate in the said Town of Clifton, and at said Smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad *guage* track, being the hopper on said furnace on which Joseph B. Hammer, the plaintiff above named was working when he was injured at said Smelter, on or about the 28th day of December, 1914; that at last named point affiant worked with the said Marshall and the said Fraser in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth (2¼) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle iron are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and with his feet in the said hopper,

240 reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while said Marshall was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said affiant working with said Marshall to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having

been marked on the angle iron, it was the practical act to remove said angle iron and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon this affiant screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time in the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than said Marshall having his feet therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

241 That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

A. B. JONES.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

Charles Bond, being by me first duly sworn according to law on oath deposes and says:

That he is thirty-five (35) years of age; is now and has been for about eight (8) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona, that for about eight 242 (8) years prior to the date hereon, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at its engineering offices at said Town of Clifton, in the capacity of civil and mechanical engineer.

That on the 5th day of January, 1916, affiant in company with George W. Fraser, W. C. Marshall and A. B. Jones, at the request of The Arizona Copper Company, Limited, went to the smelter of said defendant, situate near the said Town of Clifton, and at said smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad guage track; that at last named point watched the said Marshall and the said Fraser and the said Jones, place in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth (2¼) inch hole between the top of said hopper and the under side of said feed floor; that the purpose and use of said angle irons are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and with his feet in the said hopper, reached across the opening into said hopper and held suspended in his hands said angle irons on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut; that while said Marshall was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said Jones work-
243 ing with said Marshall to have marked the point for the holes to be drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon said Jones screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time in the operation of placing either of said angle irons in position was it necessary for any person assisting therein to get down into said hopper other than said Marshall having his feet therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial the statements herein contained.

And further affiant saith not.

CHARLES BOND.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

Affidavit.

George W. Fraser, being by me first duly sworn according to law on oath deposes and says:

That he is fifty-two (52) years of age; is now and has been for thirty (30) years last past a resident of the Town of Clifton, County of Greenlee, State of Arizona; that for about thirty (30) years prior to the 11th day of September, 1915, he was in the employ of The Arizona Copper Company, Limited, the defendant above named, at the smelter of said company.

That on the 5th day of January, 1916, affiant in company with W. C. Marshall, A. B. Jones, and Charlie Bond, at the request of The Arizona Copper Company, Limited, went to the said smelter of said defendant, situate in the said Town of Clifton, and at said smelter went to that particular hopper situate on the south end of No. 1 furnace, between the rails of the west broad gauge track, being the hopper on said furnace on which Joseph B. Hammer the plaintiff above named was working when he was injured at said smelter, on or about the 28th day of December, 1914; that at last named point affiant assisted the said Jones and the said Marshall in placing in position angle irons on the south and north sides of said hopper, by placing them on the top of the hopper and the bottom or under side of the feed floor, to cover a space of two and one-fourth (2¼) inch hole between the top of said hopper and the underside
245 of said feed floor; that the purpose and use of said angle irons are to prevent the overflow of ore from the hopper when filled; that the method and practice used in placing each of said angle irons in the position described were as follows: That said Marshall sitting upon the feed floor and at the edge of the hopper and just opposite the side of the hopper on which the angle iron was to be placed and allowing his feet to hang in said hopper reached across the opening into said hopper and held suspended in his hands said angle iron on top of the hopper, below and up against the under side of the feed floor; that to hold said angle iron in place a hole is drilled through the feed floor and through the angle iron at either end and bolts inserted in the hole and held by a nut;

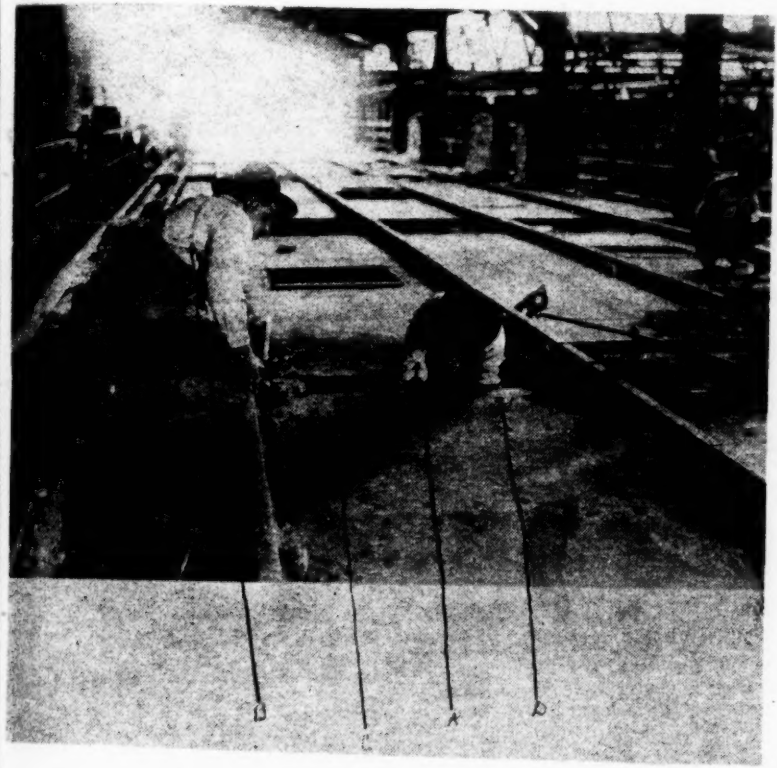
that while said Marshall was holding said angle iron beneath said feed floor as aforesaid, it was the practical act for said Jones working with said Marshall to have marked the point for the holes to be drilled in the angle iron, through the holes previously drilled through the feed floor; the point for the holes having been marked on the angle iron, it was the practical act to remove said angle iron, and have the holes therein for the insertion of the bolts drilled at the points marked. That said Marshall sitting as above described on the edge of the opening into said hopper held said angle iron as above described and inserted the bolts in the holes at either end of said angle iron up through said angle iron and said feed floor and that thereupon the said Jones screwed down the nuts. That said angle iron, bolts and nuts were then ready to be tightened into position; that the act hereinabove described was then reversed and performed upon the other or north side of said hopper; that at no time
246 in the operation of placing either of said angle irons in position, was it necessary for this affiant or any person assisting him to get down into said hopper other than said Marshall allowing his feet to hang therein while sitting on the feed floor as hereinabove described; that the result obtained by this method was a workmanlike job and resulted in the fitting of the angle irons tight enough to answer the purpose required.

That the following and hereto attached four photographs marked Photograph No. 1, Photograph No. 2, Photograph No. 3, and Photograph No. 4, respectively, were taken at said smelter under my supervision and in my presence and in the presence also of said Marshall, Jones and Bond, and that said photographs are views of what is known as the feed floor or charge floor and the hoppers thereon and in particular of the hopper in which Joseph B. Hammer, the plaintiff above named was at work at the time he was injured on or about the 28th day of December, 1914. That said views are full, true and correct representations and reproductions of that part of said feed floor or charge floor of said smelter that is included within said views and each thereof. That said views or pictures or photographs were taken under my supervision by O. A. Risdon of said Town of Clifton; that I have examined each of said photographs and that each thereof is a full, true and correct reproduction of the things hereinbefore mentioned

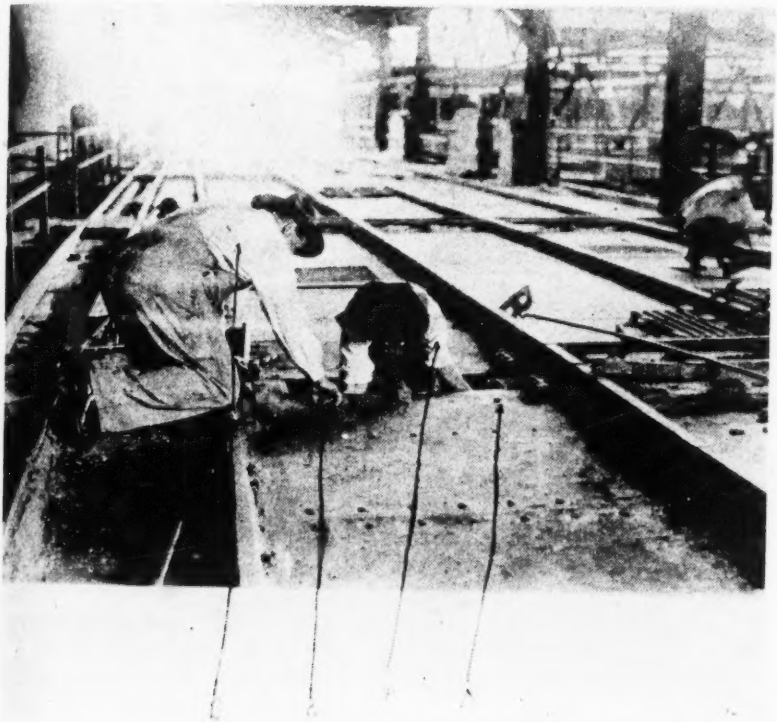
That view marked Photograph No. 1, is a picture of the feed floor or charge floor in said smelter and shows in particular the hopper in which Hammer was working at the time of his injury. Arrow A and arrow E indicate the rails of the broad
247 guage track running north and south across said feed floor upon which was operated at the time of Hammer's injury, the calcine car. Arrow B indicates the hopper in which Hammer was working at said time. Arrow D, indicates the fettling track being a track running east and west of eighteen (18) inch guage at right angles to said broad guage track. That arrow C indicates the direction in which the calcine car came in over said broad guage tracks prior to and at the time of Hammer's said injury.

That view marked Photograph No. 2 is another view of said feed floor or charge floor and of said hopper. Arrow A indicates said

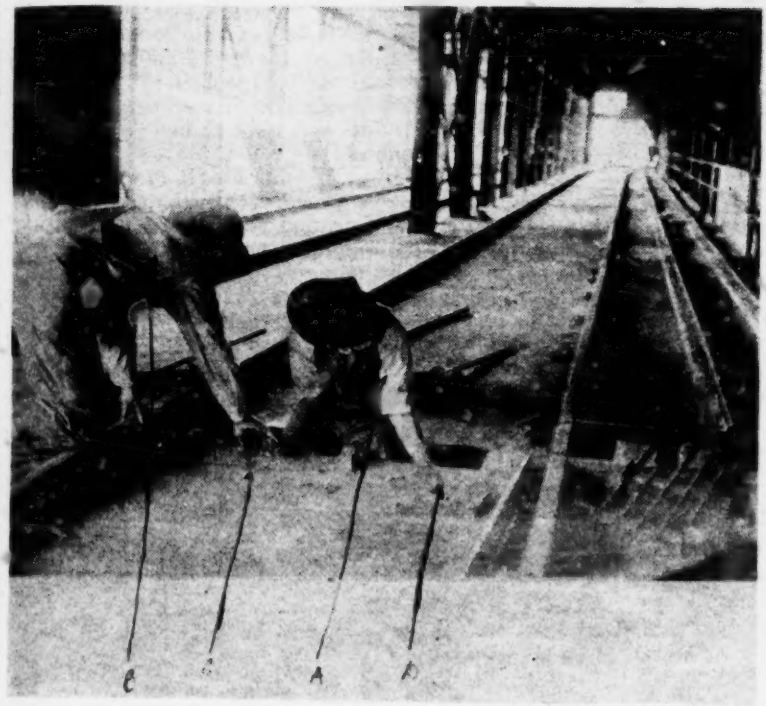
PHOTOGRAPH NO. 1.



PHOTOGRAPH NO. 2



PHOTOGRAPH NO. 3.



PHOTOGRAPH NO. 4.

Marshall sitting on said feed floor at the edge of said hopper holding in place on the south side of said hopper with his hands the identical angle iron used by Hammer at the time of his said injury. That arrow C indicates the bolt which runs through the angle iron and feed floor and protrudes above the feed floor; said bolt being now in position and ready for the said Jones indicated by arrow B, to place thereon the nut lying upon the feed floor indicated by arrow D.

That view marked Photograph No. 3, is another view of said feed floor and of said hopper. That arrow A indicates said Marshall holding said angle iron as described hereinabove in reference to Photograph No. 2. Arrow B, indicates said Jones placing said nut upon said bolt as described hereinabove in reference to Photograph No. 2. That arrow D indicates the nut already placed and screwed down on the bolt at the other end of said angle iron. That arrow C indicates the nut that the said Jones is screwing down on the bolt at the near end of said angle iron.

That view marked Photograph No. 4 is another view of said feed floor and of said hopper. That arrow A indicates the said
248 Marshall holding an angle iron in position on the north end of said hopper in the manner described hereinabove in reference to Photograph No. 2. That arrow D indicates the nut screwed down upon the bolt protruding through said angle iron and said feed floor. That arrow B indicates the said Jones screwing down the nut indicated by the arrow C upon the bolt protruding through said angle iron and said feed floor.

That this affiant will present himself upon due notice at any hearing or trial in the above entitled cause and that he will give as testimony in such hearing or trial, the statements herein contained.

And further affiant saith not.

GEORGE W. FRASER.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.] WALTER B. FOOTE
Notary Puolic in and for the County of Greenlee, State of Arizona.

My Commission expires Dec. 31, 1916.

(Here follow photographs marked pp. 249, 250, 251, and 252.)

253 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

O. A. Risdon, being by me first duly sworn according to law on oath deposes and says:

That he is now and has been for 15 years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona; that he is by trade and profession a photographer for 18 years last past and that affiant has maintained a studio and has been engaged in the trade and profession of a photographer in the said Town of Clifton for the said period of 15 years last past.

That on the 5th day of January, 1916, affiant in company with George W. Fraser, A. B. Jones, W. C. Marshall and Charles Bond, all of the said Town of Clifton, at the request of The Arizona Copper Company, Limited, the defendant above named, went to defendant's smelter near the said Town of Clifton and in particular upon and about what is known as the feed floor of said new smelter whereon are situate a number of hoppers used to feed ore to the furnaces below said feed floor.

That affiant has examined photographs marked Photograph No. 1, Photograph No. 2, Photograph No. 3 and Photograph No. 4, respectively, attached to the foregoing sworn affidavit of
254 George W. Fraser; that each of said photograph- is a full, true and correct reproduction made by this affiant from camera plates made and taken with an accurate camera by this affiant at said smelter on last said date in the presence of said persons and that said Photographs and each thereof, are full, true and correct representations of that part of said smelter and in particular of the feed floor and said hoppers embraced within the view of said photographs and each thereof.

O. A. RISDON.

Subscribed and sworn to before me this 6th day of January, 1916.
[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My Commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

Estanislado Sierra, after being duly sworn, on his oath deposes and says:

255 That on the twenty-eighth day of December, 1914, I was employed by the Arizona Copper Company, Limited, at its smelter about two miles south of the Town of Clifton, and was working at that time and place with Mike Donahue, a machinist who was engaged in repairs in machinery at said smelter.

That at that time and place I was working for Mike Donahue in the roasters and we were engaged in making holes in some plates in order to make the coal bin higher in said roasters.

That at about eleven o'clock some one came and took away the air motor which we were using, removing it to the reverb-atory furnaces which are immediately under the feed floor of the smelter.

That at about one thirty p. m., I went from the roasters over to the feed floor to bring or have brought back said air motor to the roasters and while I was there the calcine car came on to the feed floor on the track where the hopper in which Hammer was working is situated. That calcine car stopped about 15 or 20 feet from the hopper in which Hammer was working and I heard Joe Hammer's helper say to the motorman of the calcine car, Estanislado Provincio, to come on. I also hear- Joe Hammer call out from the hopper in which he was working, to the motor man to come on and he appeared to be mad about something. After being repeatedly told to come out of the hopper he refused and after this the motor man started the calcine car and moved over the hopper in which Hammer was at work.

That at the time the car passed over the Hopper in which Hammer was working, I was standing at a point on the feed

256 floor about 20 to 25 feet in an easterly direction from the hopper in which Hammer was working. I think it was on the 28th day of December, A. D., 1914. At least, it was on the day Mr. Hammer was scalded by calcine while at work in this hopper.

That at the time the calcine motor passed over the hopper in which Hammer was at work, I saw only three people, namely, Mauro Provencio, Gustavo Provencio and Estanislado Provincio. Estanislado Provencio, the motorman was on the other side of the track, opposite to me, but in plain view.

That I know Elmer Bentley but I did not see him at or near the hopper in which Hammer was at work either before or after the calcine car passed over the hopper.

That my residence is in Clifton, Arizona, where I have lived for the past twenty years.

ESTANISLADO SIERRA.

Sworn and subscribed to before me this sixth day of January, A. D., 1916.

[NOTARIAL SEAL.] JOHN EVANS,
Notary Public.

My Commission expires Feb. 23rd, 1916.

257 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

J. G. Cooper, being by me first duly sworn according to law on oath deposes and says:

That he is the Cashier of The Arizona Copper Company, Limited, the defendant above named, and is authorized to make this affidavit; that he has read the foregoing affidavits of T. M. Vaughan and Elizabeth Vaughan his wife, and of W. C. Marshall, A. B. Jones, George W. Fraser and Charles Bond, and that the matters and things set forth in each of said affidavits pertaining to this cause and proffered for production in evidence at any trial or retrial of this cause, are in fact newly discovered evidence; that the matters and things contained in each of said affidavits could not have been produced at the trial of this cause with reasonable diligence.

That immediately following the injury to plaintiff herein and continuously to the time of the trial of this cause, this defendant used all possible diligence by inquiring and investigating to ascertain and learn the names of the persons who had witnessed the injury to plaintiff and who were possessed of any information or knowledge pertinent to the issues involved herein; and that this defendant did interview and examine and did produce at the trial hereof, all persons available to defendant whom this defendant knew to have knowledge or information pertinent to the issues herein.

258 That it was a surprise to this defendant on the trial hereof that witness Elmer Bentley called on behalf of plaintiff had witnessed the injury to plaintiff; that the testimony of said witness Bentley that he had been a spectator to the injury to Hammer was the first intimation to defendant that said Bentley was possessed of knowledge and information pertinent to the issues herein; that immediately subsequent to the trial hereof, this defendant caused the testimony of the said Bentley of the trial hereof to be investigated and upon such investigation defendant learned through the said T. M. Vaughan and his wife of the conversation with the said Bentley, set forth and detailed in their respective affidavits; that immediately following said trial, this defendant

endeavored to and did get into communication with Harry Neilson, its former foreman of repairs at its smelter where this plaintiff was injured and learned by letter from said Neilson that at the time of the injury to this plaintiff the said Neilson and the said Bentley were in conversation together concerning the work to be done at said smelter, and said Neilson informed this defendant that the said Bentley could not honestly and truthfully state that the car which ran over the hopper wherein Hammer was working at the time of his injury, did not stop before so going over said hopper and thereby give the said plaintiff an opportunity to get out of said hopper and assume a place of safety; that said Neilson informed this defendant in said letter that the said Bentley did not alone take plaintiff out of the hopper after his injury and that the first man to Hammer after his injury was plaintiff's helper and that
259 when said Neilson came upon the scene of the injury a few minutes after said injury had occurred, said Bentley said to the said Neilson, "I don't see how he ever got out. When I came upon the feed floor I thought the car had run over old Joe, the way he was lying on the feed floor;" that prior to the trial hereof this defendant, its officers agents or attorneys, were not apprised by the said Neilson or by any other person of these statements attributed to the said Bentley, in fact was not apprised that the said Bentley was in the possession of any knowledge or information of whatsoever kind, pertinent or relevant to the issues in this cause. That immediately upon the receipt of said letter from said Neilson this defendant caused a telegram to be sent to the said Neilson at his address in Chicago, asking the said Neilson to return immediately to the Town of Clifton, it being the purpose of this defendant to take the sworn affidavit of the said Neilson upon the statements contained in said letter to be produced before and filed with this court in support of defendant's petition for new trial. That in the interim from the receipt of said letter to the sending of said telegram, said Neilson had departed from the City of Chicago to the City of Clinton, Indiana, and on that account the delivery of defendant's telegram was delayed. That upon the receipt of said telegram said Neilson immediately wired this defendant that he was ready to return forthwith to the Town of Clifton; that thereupon defendant wired said Neilson at the said Town of Clinton, Indiana, to start at once for the Town of Clifton, and arranged by wire that the said Neilson be afforded immediate transportation from
260 said Clinton, Indiana, to said Town of Clifton; that on the 5th day of January, 1916, this defendant received a wire from the said Neilson stating that the was enroute for the town of Clifton and would arrive thereat on or about the 9th or 10th day of January, 1916; that upon the arrival of the said Neilson this defendant proposes to and will take the sworn affidavit of the said Neilson to the matters and things contained in said letter, and will present and file with said court as soon as possible, said affidavit so taken.

That this defendant was surprised by the testimony of the plaintiff herein that it was impossible for plaintiff to place the angle

irons in the hopper on which he was working at the time of his injury by remaining upon the top of the feed floor and not at any time in such operation going down and into said hopper; that after said trial this defendant caused its representatives to proceed to the smelter of this defendant, whereat plaintiff was injured and there to perform the experiment upon the identical hopper and with the identical angle irons used by plaintiff to determine if said angle irons could be placed in said hopper as claimed by defendant and as denied by this plaintiff, by remaining upon the feed floor and at no time during such operation going down into said hopper. That the persons used by this defendant for that purpose were George W. Fraser, A. B. Jones, W. C. Marshall and Charles Bond. That the result of said experiment proved that said angle irons could be placed in such hopper as claimed by defendant.

That owing to the conditions of strike against this defendant in all its property and at said smelter this affiant is informed
261 and believes that it would have been impossible or would have been an act attended by personal danger to persons acting, to have attempted to perform said experiment upon said hopper within a reasonable time before the trial of this cause, to-wit: from and after the 11th day of September, 1915, upon which said date said strike was called.

That subsequent to the trial of this cause defendant has learned that one Estanislado Sierra a former employee of defendant and a former helper of one Mike Donahue a machinist who was engaged in repairs to machinery at said smelter and in the employ of defendant was in the possession of knowledge and information relevant and pertinent to the issues herein to the extent and in the manner set forth in copy of the sworn affidavit of the said Estanislado Sierra hereinbefore attached; that prior to the trial of this cause, this defendant did not know and by the exercise of reasonable diligence could not have known that said Estanislado Sierra was in possession of such knowledge and information and in this connection affiant re-asserts the statements hereinbefore made relative the diligence of defendant in the matter of investigating and ascertaining the names of persons possessed of information and knowledge relative the issues herein.

That this affiant is informed and believes that the matters and things set forth in the foregoing affidavits are true in substance and in fact and that upon further trial or re-trial of this cause, the person and persons herein named will upon due notice, present themselves at a further trial or re-trial and will give in evi-
262 dence the statements contained and indicated in said affidavits, and further affiant saith not.

J. G. COOPER.

Subscribed and sworn to before me this 6th day of January, A. D., 1916.

[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit.

H. A. Elliott, being by me first duly sworn according to law on oath deposes and says:

That he is an attorney for The Arizona Copper Company, Limited, a corporation, the defendant above named, and that he was counsel of record in the trial of this cause; that he has read the foregoing affidavit of J. G. Cooper and that the matters and things therein set forth are true in substance and in fact to the best of his information and belief.

H. A. ELLIOTT,

Subscribed and sworn to before me this 6th day of January, 1916.
[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My commission expires Dec. 31, 1916.

263 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit of Harry Neilson.

Harry Neilson, being by me first duly sworn according to law on oath deposes and says:

That he is now and has been for more than eight (8) years last past, a resident of the Town of Clifton, County of Greenlee, State of Arizona, and for five (5) years last past has been a foreman of repairs in the smelting department of The Arizona Copper Company, Limited, the defendant above named, both at what is known as its "Old Smelter" in the said Town of Clifton, and at what is known as the "New Smelter" at or near and below said Town of Clifton on the San Francisco river; that on the 28th day of December, 1914, affiant was in the employ of said company as such foreman at its said new smelter; that affiant well knows Joseph B. Hammer, the plaintiff above named and that said Hammer on the said 28th day of December, 1914, and for considerable time prior thereto had been

in the employ of said The Arizona Copper Company, Limited, at said new smelter and was a workman engaged in repairs under the authority and supervision of this affiant; that on the said 28th day of December, 1914, the said Hammer was engaged in placing angle irons in between the bottom of the feed floor and the top of a hopper on what is known as No. 1 furnace at said new smelter.

264 That this affiant well knows Elmer Benton Bentley who on said 28th day of December, 1914, was in the employ of said company as a repairman under the authority and direction of affiant and who this affiant is informed and believes was called as a witness for said Hammer at the trial of this cause at the City of Tucson, in the month of November, 1915.

That said Hammer at about the hour of 1:30 p. m., on said 28th day of December, 1914, while working placing said angle iron as aforesaid, was injured by being burned with hot calcine.

That affiant has examined the photographs hereto attached, marked Photograph No. 1, Photograph No. 2. That said photographs were taken by O. A. Risdon, a photographer residing and maintaining and operating a studio in the said Town of Clifton, in the presence of this affiant on January 12th, 1916, and that said photographs are a full, true and correct representation of that part of said new smelter included within the view thereof, and in particular of the back or west end of said No. 1 furnace.

That the arrow E on said photograph No. 1 represents the converter slag launder leading from converted room to said furnace No. 1.

That the arrow C on said Photograph No. 1 represents the west edge of the top of what is known as the feed floor on which said Hammer was working at the time of his said injury and over and across which is operated what are known as calcine cars, from one of which the hot calcine escaped and burned plaintiff.

That the arrow D represents the main air line running parallel to the back or west end of the furnaces at said new smelter and parallel to and back of the west end of said furnace No. 1. (Photograph No. 1.)

265 That at the time of the said injury of the said Hammer, this affiant and the said Bentley were engaged in conversation at the back or west end of said furnace No. 1.

That the arrow B on said Photograph No. 1, indicates the position of the said Bentley at the time of the said injury of the said Hammer and at the time the said Bentley and this affiant were engaged in conversation as aforesaid; that at such time and place the said Bentley was standing with his feet in said launder with his back to the east end of said furnace No. 1, and with his back turned to the place where the said Hammer was engaged in work as aforesaid.

That the arrow A on Photograph No. 1 indicates approximately the position of affiant at the time of the said injury of the said Hammer and at the time of the said conversation between this affiant and the said Bentley; that the indicated portrayed position of this affiant in said picture is approximately the position occupied by affiant at the time of said injury and of said conversation, in this that at last

said time affiant was standing on the other or further or north side of said launder looking up to and talking with said Bentley; that at the time of the injury of said Hammer and for some minutes prior thereto, this affiant and the said Bentley were standing as herein indicated, facing each other and engaged in conversation; that this affiant does not now remember the exact subject or subject matter of said conversation, but believes that it was in reference to the work to be performed by said Bentley at said new smelter.

That while affiant and the said Bentley were so engaged in conversation this affiant heard and has cause to believe that the said Bentley heard a cry coming from the direction of the feed
266 floor; that affiant and Bentley continued their conversation subsequent to said cry, paying little attention to the same, as this affiant believes for the reason that affiant considered that said cry came from one person yelling or crying to another; that closely following said cry, this affiant heard and has reason to believe that the said Bentley heard another cry coming distinctly as if from someone in distress and pain on said feed floor.

That on hearing said second cry this affiant exclaimed, "What's that" and started to run around to the south of said furnace to the ladder leading to said feed floor and that said Bentley then climbed over I-beams and pipes onto the feed floor; that affiant came upon said feed floor and discovered the said Hammer lying on the top of the floor, burned by hot calcine, which affiant believes came from an escapement from a calcine car; that affiant found present on said feed floor, about and assisting said Hammer, the said Bentley and a Mexican boy who was and had been acting as a helper to said Hammer and another Mexican who had been operating the calcine car as motorman; that there may have been other persons near, whom affiant does not now recall; that upon approaching the said Hammer and the said Bentley, the said Bentley said to this affiant, "I don't see how he (meaning Hammer) ever got out. When I got upon the feed floor I thought the car had run over Old Joe, the way he was laying on the feed floor," or words to that effect.

That at the time of the said injury to the said Hammer and for several minutes prior thereto, the said Bentley was talking with this affiant as aforesaid and was standing facing this affiant and standing with his back to the said west end of said No. 1 furnace and with his back to the place where the said Hammer was working as afore-
said, and in such a position that he could not and did not see
267 or observe what was going on on said feed floor at such time, either at the time of approach of said calcine car along said feed floor toward the point where said Hammer was working or at the time of the injury of the said Hammer.

That Photograph No. 2 is another view and representation of that part of said smelter hereinabove described and that the arrow D, represents the main air line running parallel to the back or west ends of the furnace at said new smelter and parallel to and back of west end of said furnace No. 1.

That the arrow A indicates approximately the position of affiant

at the time of the said injury of the said Hammer as hereinbefore described.

That the arrow B indicates the position of the said Bentley at the time of the said injury of the said Hammer and at the time said Bentley and this affiant were engaged in conversation as hereinabove described.

That the arrow C represents the west edge of the top of what is known as the feed floor on which Hammer was working at the time of his said injury as hereinabove described.

That on the 5th day of October, 1915, owing to the general shutdown of said defendant's smelter, this affiant left the Town of Clifton and went to Chicago for the purpose of securing other work, if to be found, and that affiant did go to work in the Town of Clinton, State of Indiana, in the early part of December, 1915, and continued such work until in the early part of January, when affiant received telegraphic requests from said The Arizona Copper Company, Limited, to return to Clifton, which affiant did as soon as could be arranged after receiving such telegraphic requests, arriving in
268 the said Town of Clifton, on the 10th day of January, 1916.

Further affiant saith not.

HARRY NEILSON.

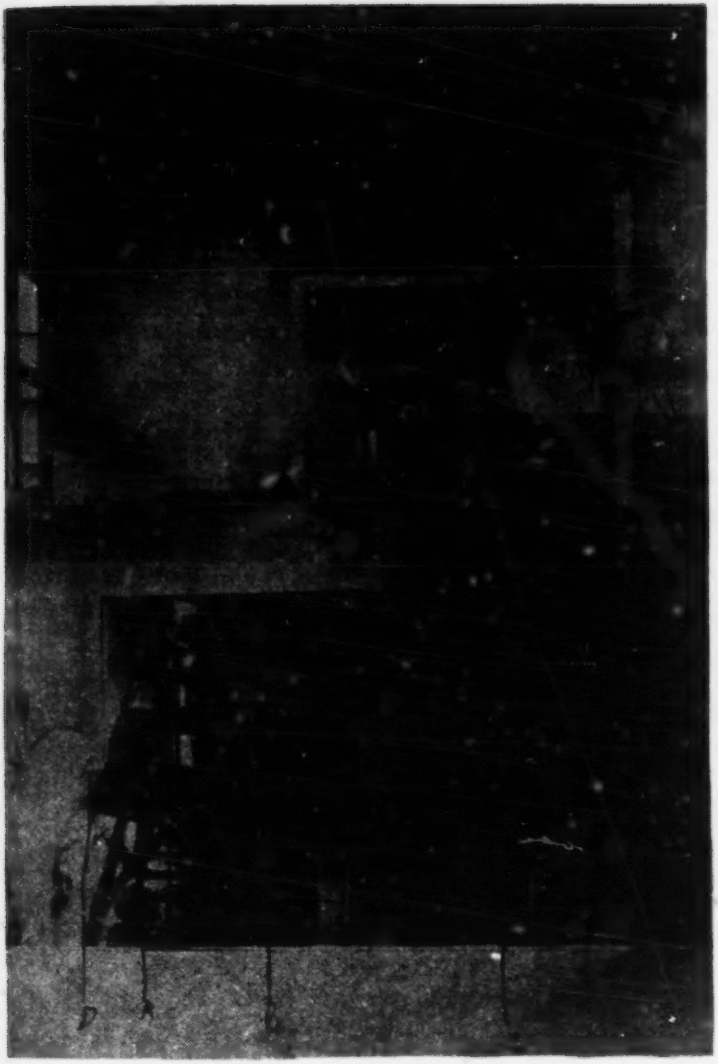
Subscribed and sworn to before me this 24th day of January, 1916.

[NOTARIAL SEAL.] WALTER B. FOOTE,
Notary Public in and for the County of Greenlee, State of Arizona.

My commission expires December 31, 1916.

(Here follow photographs marked pp. 269 & 270.)

PHOTOGRAPH NO. 1.



P H O TO G R A P H NO.2

271 Be it further remembered that contravening said petition for new trial, and said affidavits filed in behalf of defendant, and to mainttain the issues in that respect on his part, plaintiff above named, presented, served and filed the following affidavits:

In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

STATE OF ARIZONA,
County of Greenlee, ss:

Fred H. Hill being duly sworn, says: that at the times and places herein mentioned, he was a Deputy Sheriff of said county; that said defendant during the latter part of October, 1915, requested the sheriff of said county to guard its smelter at said county against violent intrusion, which said sheriff did, but that no officer, agent, or employee of defendant has at any time since been prevented from entering said smelter for the purpose of inspecting the hopper in which plaintiff was injured on or about Dec. 28th, 1914, and that ever since September 11th, 1915, said defendant could have with perfect safety inspected said hopper and experimented with the same for the purpose of obtaining evidence had it desired to do so, and that it has made no effort to inspect said hopper since October, 1915, until January 5th, 1916, when some employees entered said smelter without molestation and inspected the same.

272 FRED H. HILL,
Deputy Sheriff.

Subscribed and sworn to before me this 10th day of January, 1916. My Commission expires Feb. 15th, 1916.

[NOTARIAL SEAL.] L. KEARNEY,
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendants.

STATE OF ARIZONA,
County of Greenlee, ss:

Affidavits.

H. Halter, and R. F. Sellers, each of whom being first duly sworn, deposes and says: each for himself and not one for the other, that

he resides at Clifton, Arizona; that he is a skilled iron worker and understands boiler making work and is fully acquainted with the nature and character of work pertaining to fitting and securing angle-irons in hoppers, such as was done and required at the smelter of the defendant herein mentioned, and fully understands how such work ought to be done:

That on January 9th, 1916, at the request of said plaintiff, he visited the smelter of said defendant at Clifton, Arizona, and carefully inspected the hopper at said smelter in which the plaintiff received his present injuries by being burned by calcine on December 28th, 1914, and carefully inspected the angle-irons in said hopper and experimented with the same for the purpose of ascertaining if the angle irons in said hopper could be marked for cutting, marked for drilling of bolts, marked for making a workmanlike
273 fit, and whether the angle-iron could be held in proper position for such markings and fittings and properly bolting the same in said hopper, without the one doing said work going down into said hopper, and on such inspection, examination and experiments found that such work could not be done without going down into said hopper, and that such work could not be done from the outside, and found that it was absolutely necessary to get down into said hopper in order to hold the angle-irons in place to do the markings for cuts, bolts, fittings, and to securely fasten the same in a workmanlike manner in said hopper.

The difficulty does not consist in *perform* said work by taking off old angle-iron, unbolting the same, but the difficulty in *perform* said work does consist in holding the angle-irons in place in the hopper underneath the edge thereof where it is dark so as to ascertain where the same ought be cut to fit the hopper and perform the markings beneath the surface of the hopper where there is but scant light and make the same for the holes for bolts which pass through the angle irons so as to securely fasten the same in said hopper in order to make the same dust proof, and to hold said angle-irons in place for such markings for cutting and for the holes to be drilled in order to secure a close and workmanlike manner of fitting of the angle irons in the hopper.

That on such examination and inspection of said hopper he further found that the defendant through any employees it might have sent, on January 5th, 1916, did not do nor perform any of said markings, drillings, and fittings, at said hopper, and found that all that was done that the bolts which hold said angle-irons in said hopper had been removed and one angle iron had been taken off, and another had been loosened up by unscrewing the bolts,
274 and doing such loosening did not require any skill or knowledge of said work, and in no way demonstrating the difficulties of performing the work of properly fitting and securing said angle irons in said hopper.

That he further made an effort to ascertain by actual experiment with one of said angle irons to ascertain whether it could be held in proper place in said hopper without going down into said hopper in order to perform said markings and fittings and found that such

work could not be done from the outside, but that it was necessary for the one doing such work to get down in the hopper in order to do said work in a workmanlike manner.

That said H. Halter, says for himself, that he is 39 years of age, is a boiler maker by trade; that for eighteen months he was foreman for said defendant in charge of boiler and sheet iron construction at said smelter, and that while he was such foreman he had put in most of the hoppers in said smelter which are the same as the hopper aforesaid; that the work of putting in said hoppers *were* done under his direction by men employed under him.

H. HALTER.
R. F. SELLERS.

Subscribed and sworn to before me this 10th day of January, 1916, and I hereby certify that I consider the above named deponents H. Halter and R. F. Sellers, credible and reliable witnesses, and that the foregoing affidavit was read by each of them before their signatures were affixed thereto, and the oath made by them.

My commission expires Oct. 25th, 1917.

[NOTARIAL SEAL.] E. H. APODOCG,
Notary Public.

275 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

STATE OF ARIZONA,
County of Greenlee, ss:

Affidavit of Elmer Benton Bentley.

Elmer Benton Bentley, being first duly sworn, says:

That he was a witness on the trial of said cause in said court; that at the request of L. Kearney, Attorney for said plaintiff, he has read the affidavits of T. M. Vaughn, Elizabeth Vaughn, W. C. Marshall, A. B. Jones, Charles Bond, George W. Fraser, Estanislado Sierra, and J. G. Cooper, all of which are sworn to before Walter B. Foote, A Notary Public in and for Greenlee County, State of Arizona, on the respective dates Dec. 4th, 1914, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6th, 1916, Dec. 6, 1916, Dec. 6th, 1916, except the deposition of said Estanislado Sierra, which was sworn to before John Evans, a Notary Public, on Dec. 6th, 1916; that said affidavits as affidavit is informed and believes are filed in said cause in support of defendant's petition for new trial of said cause;

Affiant says he did not say to nor in the presence or hearing of said T. M. Vaughn and Elizabeth Vaughn, or either of them, or

to any other person that "the damned old fool was told to get out and he (meaning the said Hammer) refused to get out on account of its being a tight place and hard to get out of and into," as stated in the affidavits of said T. M. Vaughn and Elizabeth
276 Vaughn, and that no such conversation was had and that affiant did not make such remarks nor say *saud* things in the presence or hearing of said T. M. Vaughn and Elizabeth Vaughn, or either of them, or in the presence or hearing of any other person.

That on January 6th, 1916, affiant at the request of L. Kearney, visited the smelter of said defendant at Clifton, Arizona, to inspect the hopper in which plaintiff sustained his injuries by being burned by calcine on or about Dec. 28th, 1914, for the purpose of ascertaining the work, nature of the work and what experiments had been carried on, done or performed by George W. Fraser, A. B. Jones, W. C. Marshall and Charlie Bond, on or about the 5th day of January, 1916, and of the particular acts and things stated that they did in their said affidavits herein, and that this affiant on January 6th, 1916, on making said examination of said hopper and angle-irons which were stated to have been taken off and put in place by said W. C. Marshall, George Fraser, A. B. Jones and Charlie Bond, on Jan. 5th, 1916, in the hopper in which plaintiff received his injury by being burned by calcine, Dec. 28th, 1914, affiant discovered and found that said W. C. Marshall, George Fraser, A. B. Jones, and Charlie Bond in their said experimental work had done and failed to do the following things, to-wit:

That they had taken up the small Fettling track that crosses the wide gauge at right angles over the brink of the hopper aforesaid; that they had loosened the bolts that held the angle-iron in place, and that they had not replaced the same in workmanlike manner, in that they did not rebolt the same up tightly, but left a space of about two inches opening at the upper surface thereof; that they did not do any markings for drilling of holes for bolts nor do
277 any markings of angle-irons to be cut off to fit the spaces in the hopper. All they did was to remove the bolts and loosen the angle-iron without securely replacing it again.

That the difficulty in performing the work does not consist in taking off the angle-irons by unscrewing the bolts as stated in their said affidavits, but the difficulty arises in holding the angle-irons in place in the hopper underneath the edge thereof so as to ascertain where the same should be cut off to fit the hopper and do the markings in and underneath the surface of the hopper where the holes are to be drilled for the bolts which pass through the angle-irons so as to securely and tightly fasten the angle-irons in the hopper so as to make it dust proof, and to mark so that holes may be drilled to match the holes in the angle-irons and to the end to secure close fittings when the angle-irons are finally bolted in place.

That said W. C. Marshall, George Fraser, A. B. Jones, and Charlie Bond did not do nor perform any markings for holes to be drilled or cut, and did not drill nor cut any holes, nor mark or cut

any angle-irons to fit the hopper, and did not perform any of the difficult feats of marking, fitting, cutting or drilling, nor fitting in place the said angle-irons.

That affiant on Jan. 6th, 1916, in the presence of one person, tried to hold said angle-irons in place underneath in said hopper so that said markings might be done and found that the same could not be done without going down into the hopper, because it was work underneath in the hopper, the iron heavy and hard to hold in place in the darkness of the hopper, and that the markings for the cutting of angle-irons to fit, marking for holes to be drilled so
278 that when the angle iron is finally placed to make a workmanlike job and dust proof as required cannot be done from the surface outside of the hopper;

That the said Marshall, Fraser, Jones and Bond did not, nor did either of them, perform any of the difficult features of said work, and what they did do took them five times longer to do than to do the work as a skilled mechanic would have done it, and in fact *was* all they did do was to unloose the bolts and slide the angle-irons out and partially replace one, and leave the other angle iron down in the hopper.

That the pictures Nos. 2, 3, and 4, attached to their said affidavits herein show them in the hopper doing the simple act of holding up the old angle-iron which had been cut and fitted, the holes therein drilled by the plaintiff.

Affiant says in regard to the statements of Estanislado Sierra, contained in his said affidavit herein, as follows:

That said Estanislado Sierra was not present when the plaintiff was injured by hot calcine on Dec. 28th 1914, he was not in seeing distance nor in hearing distance; the place where he was working, taking into consideration the roaring of the furnaces would absolutely prevent him from hearing any thing that the plaintiff might have said just prior to or at the time plaintiff was injured, and that he could not have heard the plaintiff's helper say anything for the reason he was not in seeing or hearing distance at the time the plaintiff was injured and that he was not within 20 nor 50 feet, and was not upon the feed floor when the plaintiff was in-
279 jured, and could not have known anything of the injury of the plaintiff until some time after he had received his said injuries. Said Estanislado Sierra did not see this affiant near the hopper in which said Hammer was at work either before or after the calcine car had passed over the hopper because he said Sierra was not present, nor in hearing or seeing distance.

In regard to the matters and things set out and stated in the said affidavit of J. G. Cooper, cashier of defendant company, filed herein, which affiant has read, he makes the following statement, to-wit:

That on December 28th, 1914, the day on which plaintiff was injured by being burned with calcine at defendant's smelter at Clifton, Arizona, and pertaining to such injuries the said suit was begun and tried in said court,—this affiant, on Dec. 28th, 1914, had a conversation with said George W. Fraser, A. B. Jones and Harry

Neilson, all of whom were then and there officers and agents of the defendant company and as such were in charge of the smelter work of defendant at its said smelter at Clifton, Arizona, and each of those persons was told by affiant on December 28th, 1914, or on the following day, that this affiant was present and saw the said injury of the plaintiff; that said George W. Fraser and Harry Neilson, during December, 1914, asked this affiant a few questions about the circumstances of the injury of the plaintiff.

That said George W. Fraser for many years has been the general-manager of the smelter-works of defendant, and at the time of the said conversation with him during December 1914, in which affiant told him some of the circumstances of the injuries of the plaintiff, he, said George W. Fraser, was general-foreman of
280 the repair-work of the defendant at its smelter aforesaid, and said Harry Neilson was during December, 1914, a foreman in charge of certain department of work for defendant at its said smelter, each of whom were bosses and in charge of certain gangs of workmen of the defendant at its said smelter.

That for at least five months before the trial of said cause, the said George W. Fraser believed that this affiant would be called as a witness on the trial of this action, and had asked this affiant what he would testify to when called as a witness, and that said Fraser had long before the trial of this action told affiant that he, Fraser, would go as a witness, and affiant had at all times up to the trial of the case expected to be called as a witness on the part of the defendant, but when the time came for the trial, the defendant for some cause did not request affiant to go as a witness.

It is not true that defendant had no knowledge or information of the matters and things that affiant knew concerning the injury of the plaintiff until the time of the trial of said action in said court, the defendant knew from the first that affiant was present and saw the injury of the plaintiff and knew very well that in all probability that this affiant would be called as a witness on the trial of said action.

Further it is not true that affiant and Harry Neilson were engaged in a conversation at the time plaintiff was injured, and it is not true that affiant could not truthfully state that the car did not stop before running over the plaintiff at the time of his injury. It is not true that affiant informed Harry Neilson, or any other person, that affiant did not alone take plaintiff out of the hopper after
281 his injuries, or that the first man to Hammer after his injury was the plaintiff's helper.

It is not true that when the said Neilson came up to the scene of the injury a few minutes after said injury had occurred, or at any other time or place, that this affiant said to said Harry Neilson, or to any other person, the following, to-wit:

"I don't see how he ever got out, when I came upon the feed floor I thought the car had run over old Joe, the way he was laying on the feed floor." Nor was any such conversation had, either in like words, effect or purport. The truth and fact is and was that

this affiant was the first to the plaintiff and helped him out of the hopper in which he was injured, and had reached the plaintiff immediately after his injury, just as I stated on the trial of this action, and the fact is that Harry Neilson did not come until some time after I had helped the plaintiff out of the hopper. The said George W. Fraser and Harry Neilson knew from statements from me on the day of the injury to plaintiff that I had helped him out of the hopper.

ELMER BENTON BENTLEY.

Subscribed and sworn to before me this 7th day of January, 1916. My commission expires Oct. 25, 1917.

[NOTARIAL SEAL.] E. H. APODACA,
Notary Public.

282 In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Defendant.

STATE OF ARIZONA,
County of Greenlee, ss:

Affidavit of Plaintiff.

Joseph B. Hammer, being first duly sworn, deposes and says; that he is the plaintiff named in said cause and court; that when he was injured by hot calcine in a hopper of defendant's smelter at Clifton, Arizona, on Dec. 28th, 1914, that Elmer Benton Bentley was present and assisted this affiant out of the hopper; that the only other persons present at the time affiant was injured was the helper of this affiant and the Mexican boy in charge of the calcine car.

That affiant has read the affidavit of Estanislado Sierra, filed herein in support of defendant's petition for a new trial and in regard to the truth of said affidavit this affiant states the fact to be that said Sierra was not within seeing or hearing distance when affiant was injured by hot calcine on Dec. 28th, 1914; affiant further says that he knows the said Estanislado Sierra, who is an ignorant Mexican boy, and who for the past two months has been, and presently is, boarded and clothed, free of charge, by said defendant at its refugee camp at Duncan, Arizona.

That ever since September 11th, 1915, affiant has lived at Morenci, Arizona, and during such time every few days he has personally visited Clifton, Arizona, and is thoroughly conversant with
283 the labor troubles, peace, law and order conditions at said Clifton, and knows that said defendant, its officers, agents and servants could at any time since September 11th, 1915, with perfect safety, had it desired to do so, have visited its said smelter

and inspected said hopper and carried on all experiments therewith that it might have desired, and because there was a labor strike at said Clifton during said time does not furnish any excuse why the defendant did not examine and inspect said hopper had it desired to do so; that said strike and labor situation on January 5th, 1916, when defendant did enter said smelter and inspected and experimented with said hopper, was no different than it has been at any time since September 11th, 1915; that said strike and labor troubles have not been settled, and are just the same as they were at any time since September 11th, 1915.

Affiant further states as he did on the trial of said cause testify that the angle iron could not be put into said hopper without going down into said hopper; that affiant visited said smelter on January 9th, 1916, and inspected the hopper in which he was injured on Dec. 28th, 1914, for the purpose of ascertaining what work and experiments that the defendant through its servants, George W. Fraser, A. B. Jones, W. C. Marshall and Charlie Bond, had done or caused to be done on January 5th, 1916, and this affiant in company with H. Halter and R. F. Sellers, on said 9th day of January, 1916, carefully examined and inspected said hopper and found that the said defendant through its said employees had simply loosened the bolts that held the angle irons to said hopper, and that they did not do any markings for bolts or cutting of angle irons to fit said hopper; that the difficulty in performing said work consists in holding the angle iron underneath the edge of said hopper where
284 it is dark and marking the same to but cut to fit and marking the holes to be drilled so that when the angle iron is finally secured in said hopper that it will be a close fit and the work done in a workmanlike manner, none which was done by the defendant through its said employees on January 5th, 1916; that affiant and said H. Haler and R. F. Sellers made an experiment to see if said work of putting in angle irons could be done from outside said hopper and found on such examination that the work could not be so done, and that it was absolutely necessary to go down into said hopper to do said work.

JOSEPH B. HAMMER.

Subscribed and sworn to before me this 12th day of January, 1916.
My commission expires Oct. 25th, 1917.

[SEAL.] E. H. APODACA,
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit of E. H. Apodaca.

STATE OF ARIZONA,
County of Greenlee, ss:

E. H. Apodaca, being duly sworn, says: that for the past fifteen years he has resided at Clifton, Arizona; that he is a teacher
285 of the Spanish and English languages; that he has read the affidavit of Estanislado Sierra and knows the contents thereof; that for the past ten years he has been acquainted with said Sierra; that said Sierra is unable to read ordinary English; that said Sierra for the past two months or thereabouts has been living at the refugee camp of defendant at Duncan, Arizona, and as he is informed and believes that said Sierra during said time has received free board and lodging from defendant at said refugee camp.

E. H. APODACA.

Subscribed and sworn to before me this 11th day of January, 1916.
My commission expires February 15th, 1916.
[NOTORIAL SEAL.] L. KEARNEY,
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit of L. Kearney.

STATE OF ARIZONA,
County of Greenlee, ss:

I, L. Kearney, being duly sworn, say; That I am one of the attorneys for plaintiff in said action, that to my certain knowledge the defendant, its officers, agents and attorneys, ever since December 28th, 1914, have been looking up witnesses and evidence pertaining to the injury the plaintiff sustained at its smelter, at Clifton, Arizona, on December 28th, 1914; that for one year prior thereto and
286 every since December 28th, 1914, the smelter at which sustained the injury concerning which this action was brought, the said smelter has been under the exclusive control and

management of the defendant, its officers and agents, and that it has had every opportunity to know and ascertain all facts about the hopper in which the plaintiff was injured.

That ever since January 1, 1915, I have resided at Clifton, Arizona, and during the labor strike period, from September 11th, 1915, up to the present time, I have been fully acquainted with the nature of the disputes between the defendant and its employees, and am fully conversant with all facts pertaining to conditions existing at said Clifton, and know that if the defendant had wished to go to its smelter and examine the hopper in which the plaintiff was injured on December 28th, 1914, that it could have done so without having been prevented from making inspections and experiments with said hopper, but the fact is that it made no such effort since Sept. 11th, 1915, until on January 5th, 1916, yet during said strike, when it went into said smelter with some of its employees and made an inspection of said hopper for the purpose of filing affidavits in support of its petition for a new trial herein, and that it made such inspection without molestation from any one.

That during the month of March, 1915, at Clifton, Arizona, one George W. Fraser, who then was, and ever since has been, general foreman of repair work for defendant at its smelter at said Clifton, who was a witness on the trial of said cause and whose affidavits are filed herein, asked me if I was attorney for the plaintiff in said action and if I would call Elmer Bentley as a witness, and in the same conversation the said George W. Fraser, said to me that Elmer Bentley knew considerable about the injury to the plaintiff, and
287 that he thought that Elmer Bentley would be a good witness for me on the trial of said cause, and he further said in that conversation that he had told said Elmer Bentley that if he went as a witness to tell the facts in the case and swear to no lie for any corporation; the said Elmer Bentley was a witness on the trial of said cause, and whose full name is Elmer Benton Bentley.

I further state that said George W. Fraser was the one who attended to procuring the attendance of the witnesses on the part of the defendant on the trial had in said cause, and that he advanced the cost money to defray the expenses of witnesses for defendant on going to Tucson, Arizona, to attend the trial of said cause and that for two weeks before the time of said trial, the said George W. Fraser was assisting in locating witnesses for defendant on said trial, and that he advanced the expense money to the witnesses who went to said trial for the defendant.

That ever since the labor strike at said Clifton, Sept. 11th, 1915, some of the officers, agents and attorneys for said defendant have remained at said Clifton, and yet are at said Clifton, and that the said labor strike has not yet been settled.

That said George W. Fraser has been at Clifton, Arizona, ever since September 11th, 1915, with the exception of about a week, and that he is yet at said Clifton; that H. A. Elliott one of the attorneys for defendant in said action has ever since January 1, 1915, been at said Clifton, except when he went away on his own accord on business matters for a few days at a time, and that W. C.

McFarland another attorney for defendant in said action, has been at said Clifton, ever since January 1, 1915, up to the present time, with the exception of about three weeks he was away, when he returned to said Clifton, during Dec. 1915, and that he is now and for for some time past has been at said Clifton, and that the said
288 labor strike is not yet ended, and that said McFarland since his return has not been molested by any one; also J. C. Cooper, Cashier of defendant, whose affidavit has been filed herein, has practically ever since September 11th, 1915, with the exception of about two weeks when he was away on business, resid*ing* at said Clifton, and that he has not at any time been molested by strikers or any other person.

That all witnesses for defendant on the trial of said cause, and in fact all that had any knowledge of it were and have at all times been in said Greenlee County ever since September 11th, 1915, and could have been located and subpœnaed in three days' time; the fact is that the said strike and labor troubles has not at any time had anything whatever to do with procuring witnesses for defendant on said trial, and that said labor strike has not in the least prevented the defendant from procuring the attendance of witnesses on the trial of said cause.

I further state that ever since January 26, 1915, I have made a careful investigation for the purpose of ascertaining the names of all persons who were present or knew anything about the facts pertaining to said cause, and from such investigation I know that the defendant had present at said trial all persons as witnesses who were present at the injury of the plaintiff on December 28th, 1914, and at said trial it had present all persons who had any knowledge of the facts pertaining to the plaintiff's said injuries and all persons whose testimony could prove of any advantage to the defendant were present and testified at the trial of said cause.

L. KEARNEY.

Subscribed and sworn to before me this 8th day of January, 1916.
[NOTARIAL SEAL.] E. H. APODACA,
Notary Public.

My commission expires Oct. 25, 1917.

289 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit of Paul Hammer.

STATE OF ARIZONA,
County of Greenlee, ss:

Paul Hammer, being first duly sworn says: that for the past four years he has resided at said Greenlee County, and during the

year 1914, he lived at Clifton, in said county, and was an employee of defendant corporation; that he is of the age of 24 years, and is a son of the plaintiff herein; that during December 1914, one Harry Neilson was an employee of said defendant, and held a position with it as foreman of repairs at its smelter at Clifton, Arizona, that on the evening of December 28th, 1914, affiant was making inquiry as to the circumstances of the injury that the plaintiff received at the smelter on December 28th, 1914, by being burned by calcine at said smelter and one person affiant asked was said Harry Neilson, and said Neilson replied as follows to such inquiry, to-wit:

"I was not right there at the time, but came up later, but that Elmer Bentley was present when Mr. Hammer (meaning the plaintiff) received his injury, and that Elmer Bentley could tell me (this affiant) more about the injury that Mr. Hammer received by being burned with hot calcine. That Bentley was there first."

That the said Bentley herein mentioned was a witness on the trial of said cause, and whose full name is Elmer Benton Bentley. That said Harry Neilson sometimes spells his name Harry Neilsen.

PAUL HAMMER.

Subscribed and sworn to before me this 14th day of January, 1916.

My Commission espires Feb. 15, 1916.

[NOTARIAL SEAL.] L. KEARNEY.
Notary Public.

290 In the United States District Court for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit Jane E. Hammer.

STATE OF ARIZONA,
County of Greenlee, ss:

I, Jane E. Hammer, being first duly sworn, depose and say: that I reside at Morenic, Arizona, am wife of above-named plaintiff, my age is 51 years; that during the year 1914, I was living at Clifton, Arizona; that I am well acquainted with one Harry Neilson, who is an employe of said defendant, and whose affidavit I am informed has been filed in this action in support of the petition of the defendant for a new trial of said cause; that on December 28th, 1914, the plaintiff was working for said defendant at its smelter at Clifton, Arizona, and was doing repair work on a hopper at said smelter, as I am informed and believe; that on December 28th, 1914, at about 2:25 p. m., of that day the said Harry Neilson with others brought the plaintiff to the Arizona Copper Company's hos-

pital close to where my dwelling was situated, the plaintiff was brought in on a push car to said hospital, and said Harry Neilson was with those who brought the plaintiff in, and I had heard a short time before that time that the plaintiff had been seriously injured by burns, and I was at the front of the hospital to see my husband, the plaintiff, and find how severely he had been injured and how he came to be injured, and when I came up to the front
291 of the hospital I learned that the plaintiff had already been taken into the hospital, and just as I came up to the hospital the said Harry Neilson and my son Albert Hammer came out of the hospital where they had taken the plaintiff, and I then asked Harry Neilson, "if Mr. Hammer was burned very badly and how it happened," and Mr. Neilson said to me in answer to that question, "I do not just know, I was not there at the time, that I went over to help Mr. Bentley cut the clothing off of Mr. Hammer, when I heard Mr. Hammer hollowing, and then Mr. Bentley called me to help cut the clothing off of Mr. Hammer." The said Bentley is known as Elmer Bentley and was a witness on said trial.

JANE E. HAMMER.

Subscribed and sworn to before me this 25th day of January, 1916.

My Commission expires October 25th, 1917.

[NOTARIAL SEAL.] E. H. APODACA,
Notary Public.

In the District Court of the United States for the District of Arizona.

JOSEPH B. HAMMER, Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIMITED (a Corporation), Defendant.

Affidavit Albert L. Hammer.

STATE OF OHIO,
County of Franklin,
City of Columbus, ss:

I, Albert L. Hammer, being duly sworn, say: That my name is Albert L. Hammer, my age is 25 years, am a son of above
292 named plaintiff, that I presently reside at Columbus, Ohio, During the year 1914, I lived at Clifton, Arizona, and was employed in the general office of said defendant; that I am well acquainted with Harry Neilson, who is an employee of said defendant and during the year 1914, he had charge of repairs for defendant at its smelter at Clifton, Arizona. On December 28th, 1914, at about 2 p. m., a 'phone message came into the officer where I was working for defendant at said Clifton, stating that Mr. Hammer, (plaintiff above named), had been badly burned, and that he was being taken to the A. C. Co. hospital. I started for the hospital and reached it about 2:20 p. m., when said Harry Neilson and others

arrived, bringing Mr. Hammer (plaintiff) on a push car, and he was taken from the car into the hospital, he was in a very bad condition and suffering greatly from burns, and I there asked said Harry Neilson how the accident occurred, and said Harry Neilson then stated in answer to my question as follows:

"I do not know, I was not present when he got burned. I was attracted by cries and I arrived after Mr. Hammer had gotten out of the pit, and I found Bentley there who asked me to help cut the clothes off of Mr. Hammer, I assisted in cutting his clothes off, and I helped to bring him to the hospital. Bentley was the first to reach Mr. Hammer and he can give you all particulars."

The Bentley above named I know as Elmer Bentley, he is a mechanic, was an employ of defendant at said smelter at time of said injury, and as I have been informed was a witness on the trial of said cause at Tucson, Arizona.

ALBERT L. HAMMER.

Subscribed and sworn to before me this 29th day of January, 1916.
My Commission expires Nov. 7th, 1918.
[NOTARIAL SEAL.] JOSEPH F. BURXLEY,
Notary Public.

293 Be it further remembered that on the 28th day of February, A. D., 1916, a juridical day of the November term of the above entitled court, during which said time judgment in the above entitled cause was rendered, plaintiff's said petition for new trial came on to be heard upon said petition and upon the said affidavits filed in support and contravention thereof. The plaintiff being represented by F. E. Curley, his attorney, and the defendant by W. C. McFarland and H. A. Elliott, its attorneys, That upon argument of the respective parties, defendant's said petition for new trial was taken under advisement by the court.

Be it further remembered that on the 29th day of February, A. D., 1916, the same being within the said November term of said court, the above entitled court by its order duly made and entered, denied defendant's said petition for new trial, to which order and ruling of the court, this defendant then and there excepted and now excepts.

Respectfully submitted:

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant.

294 Received copy of the within defendant's proposed bill of exceptions, this 1st day of March, A. D., 1916.

FRANK E. CURLEY,
Attorney for Plaintiff.

The court is in doubt as to the right of defendant to have a bill of exceptions reviewing the action of the United States District Court in and for the District of Arizona in overruling defendant's peti-

tion for a new trial, but will leave the question for the Supreme Court of the United States to pass upon. With this expression of doubt the foregoing defendant's proposed bill of exceptions is allowed and approved this 4th day of March, 1916, said day being one of juridical days of the November term of this court, being the term within which the judgment of this court in the foregoing cause was entered.

WM. H. SAWTELLE, *Judge.*

295 THE UNITED STATES OF AMERICA,
State of Arizona, County of Pima, ss:

This is to certify that the foregoing and herein incorporated affidavits of T. M. Vaughan, Elizabeth Vaughan, W. C. Marshall, A. B. Jones, Charles Bond, George W. Fraser, O. A. Risdon, Estanislado Sierra, J. G. Cooper, H. A. Elliott, Harry Neilson, Fred H. Hill, H. Halter and R. F. Sellers, Elmer Benton Bentley, Joseph B. Hammer, L. Kearney, Paul Hammer, Jane E. Hammer and Albert L. Hammer are full proof and correct copies of the affidavits and all the affidavits filed by the respective parties in the above entitled action in support and contravention of defendant's petition for new trial as the same are on record in my office in the matter of the above entitled action.

Given under my hand and seal of office this 2nd day of March, A. D., 1916.

[Seal of Court.] MOSE DRACHMAN, *Clerk.*

Endorsements: In the United States District Court in and for the District of Arizona. Joseph B. Hammer, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, Defendant. No. 39 Tucson. Defendant's Proposed Bill of Exceptions. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. W. C. McFarland, H. A. Elliott, Attorneys for Defendant, Clifton, Arizona.

296 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Petition for Writ of Error.

The above-named plaintiff in error, The Arizona Copper Company, Limited, a Corporation, respectfully shows that the above-entitled cause is now pending in the United States District Court, in and for the District of Arizona, and that judgment has therein been rendered, on the 27th day of November, A. D., 1915, upon a verdict of the jury, duly empanelled in the cause, and in favor of

the defendant in error, Joseph B. Hammer, and against The Arizona Copper Company, Limited, for the sum of Twelve Thousand ($12,000) Dollars and costs; that on the 8th day of January, 1916, plaintiff in error, The Arizona Copper Company, Limited, filed its petition for a new trial in the above-entitled cause, which said petition for a new trial was by this court denied on the 29th day of February, 1916; and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, The Arizona Copper Company, Limited, prays that a writ of error may issue in this behalf to said United States District Court, in and for the District of Arizona, and that the Clerk of said United States District Court, in and for the District of Arizona, be authorized and directed to sign, seal and issue said writ of error, and that said Clerk be further directed to send the records and proceedings of this cause, with all things concerning the
297 same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors filed herewith by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your petitioner will ever pray.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Plaintiff in Error.

Approved March 4th, 1916.

Petition granted and writ of error allowed on giving bond in the sum of Fifteen Thousand ($15,000) Dollars, conditioned as the law directs, this 4th day of March, 1916.

WM. H. SAWTELLE,
Judge of the United States District Court in and for the District of Arizona.

Endorsements: In the District Court of the United States for the District of Arizona, No. 39 Tucson. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Assignment of Errors. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error.

298 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Order Allowing Writ of Error from the Supreme Court of the United States and Fixing Amount of Supersedeas Bond.

On this 4th day of March, 1916, came Plaintiff in Error, by W. C. McFarland and H. A. Elliott, its attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said Plaintiff in Error giving a bond according to law in the sum of Fifteen Thousand ($15,000) Dollars, which shall operate as a supersedeas bond.

And it is further ordered that said petition is hereby allowed and granted, and that the writ of error be allowed in said cause, returnable before the Supreme Court of the United States on the 1st day of May, 1916, and that the Clerk of this court is authorized and directed to sign and seal the writ, and that a transcript of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

It is further ordered that all proceedings herein be stayed until determination of said writ of error by said Supreme Court of the United States.

WM. H. SAWTELLE,
Judge of the District Court of the United States in and for the District of Arizona.

299 Service of the within order for a writ of error by receipt of true copy admitted this, the 4 day of March, 1916.
FRANK E. CURLEY,
Attorney for Defendant in Error.

Endorsements: No. 39 Tucson. In the District Court of the United States in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Order allowing writ of error from the Supreme Court of the United States and fixing amount of Supersedeas Bond. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

300 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,

vs.

JOSEPH B. HAMMER, Defendant in Error.

Assignment of Errors.

Comes now The Arizona Copper Company, Limited, a Corporation, by its attorneys, W. C. McFarland and H. A. Elliott, and in connection with its petition for a writ of error herein, makes the following assignment of errors, which it will urge upon the prosecution of the said writ of error in the above-entitled cause, to-wit:

I.

Because the court erred in overruling plaintiff in error's general demurrer, demurring to defendant in error's amended complaint, on the ground that said amended complaint does not state facts sufficient to constitute a cause of action against the plaintiff in error.

II.

Because the Court erred in overruling plaintiff in error's special demurrer No. 3, demurring to defendant in error's amended complaint on the ground that it appears in and by the allegations of said complaint that if this defendant in error has any cause of action against this plaintiff in error, it is by reason of the negligence of this plaintiff in error, its servants, employees or other agents, and not by reason of an accident or accidents to this defendant in error in the course of work in his employment or occupation as in said complaint alleged, arising out of and in the course of
301 his labor, service and employment and due to a condition or conditions of his said occupation or employment.

III.

Because the court erred in overruling plaintiff in error's special demurrer No. 4, demurring to defendant in error's amended complaint on the ground that if it be held by this court that defendant in error's complaint contains allegations sufficient to constitute a cause of action under the provisions or any thereof of said Chapter 6 of Title 14 of the Revised Statutes of the State of Arizona, 1913, this defendant in error has nevertheless attempted to set forth in his said complaint a cause of action, the sufficiency of which is not admitted, but expressly denied, under the common law or the law otherwise, than as provided by said Chapter 6 of said Title 14 in this particular, namely; alleged injury or injuries to this defendant in error by reason of the negligence of this plaintiff in

error, its servants, employees or other agents by reason of which several causes of action are improperly united in defendant in error's complaint.

IV.

Because the court erred in overruling plaintiff in error's special demurrer No. 6, demurring to defendant in error's amended complaint, on the ground that it appears in said complaint that the alleged injury or injuries of this defendant in error, if any there were, were occasioned wholly by, and resulted from the usual and ordinary risks of the employment in which defendant in error was engaged at the time and place of the said alleged injury or injuries as in said complaint described, and were wholly assumed by this defendant in error in entering upon and continuing in said employment, and that said risks were wholly known to and
302 appreciated by said defendant in error in entering on and continuing in said employment, or by the exercise of reasonable diligence on the part of this defendant in error, could have been fully known to and appreciated by him.

V.

Because the court erred in overruling plaintiff in error's special demurrer No. 9, demurring to defendant in error's amended complaint on the ground, that it appears upon the face of the said complaint that defendant in error seeks to recover judgment against the plaintiff in error under and by virtue of Chapter 6, Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Act, enacted pursuant to the provisions of Section 7 of Article 18 of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of this plaintiff in error, causing or contributing to defendant in error's alleged injury, and that said Employers' Liability Act, and said Section 7 of Article 18 of the Constitution of Arizona are in contravention and violation of the Constitution of the United States, particularly the 14th Amendment thereto, in that they seek to deprive this plaintiff in error of its property without due process of law, and deny it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries suffered by its employee without any fault, wrong or negligence on the part of this plaintiff in error, causing such injuries or contributing thereto.

VI.

Because the court erred in overruling plaintiff in error's special demurrer No. 10, demurring to defendant in error's amended complaint on the gound that it appears on the face of said complaint, and the records so show in this cause, that defendant in error
303 seeks to recover judgment against plaintiff in error under and by virtue of the provisions of Chapter 6 of Title 14 of the Civil Code, the Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law

is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article 18 thereof, in that said Employers' Liability Law attempts to give the defendant in error the right to recover damages from plaintiff in error in this action, notwithstanding the injuries for which said damages were claimed were contributed to or in part caused by defendant in error's own negligence, and attempts to deprive plaintiff in error of the right to wholly defeat this action by showing said injuries were contributed to and in part caused by defendant in error's own negligence.

VII.

Because the court erred in granting defendant in error's oral motion to strike that part of plaintiff in error's amended answer, being that part of Paragraph 7 on Page 13 of said answer as follows:

"Defendant is now informed and believes and upon such information and belief asserts the fact to be, that this plaintiff while so engaged upon said other and similar work, was from time to time interrupted by the operation of said calcine car, that at each of said interruptions said calcine car was stopped before running by and over the place where plaintiff was so engaged, that plaintiff was on each of said occasions warned of the approach of said car, and upon each of said occasions, well knowing the danger attendance upon remaining below said fettling floor and below and between said broad gauge tracks, while said car was operated over and above plaintiff, promptly accepted said warning and withdrew from said place of danger to a place of safety."

VIII.

Because the court erred in sustaining defendant in error's demurrer to Paragraph II, Pages 13 and 14 of plaintiff in error's amended answer, said paragraph being as follows:

"Further answering said complaint, defendant alleges that
304 by reason of the matters and things hereinabove set forth, the claimed injury or injuries of plaintiff, if any there were, either as alleged in said complaint or otherwise, were occasioned wholly by, and resulted from the usual and ordinary risks and from the unusual and extraordinary risks, deliberately, voluntarily, negligently and carelessly assumed by plaintiff, of the employment in which plaintiff was engaged at said time and place of his said injury or injuries, which said risks were wholly assumed by plaintiff by entering upon and continuing in said employment."

"That said risks were wholly known to and appreciated by said plaintiff in entering upon and continuing in said employment, or by the exercise of reasonable diligence on the part of plaintiff should have been fully known to and appreciated by him, and that said injury or injuries did not in any respect, or at all, result from, or were in any degree occasioned by any neglect or default on the part of this defendant, either as alleged in said complaint or otherwise."

IX.

Because the court erred in sustaining defendant in error's demurrer to Paragraph III, Page 14 of Plaintiff in error's amended answer, said paragraph being as follows:

"Further answering, defendant further asserts that plaintiff's said injury or injuries did not in any respect or at all result from, or were in any degree occasioned by any neglect or default on the part of the defendant, its officers, servants, employees or other agents, either as alleged in said complaint or otherwise; that if it be held that plaintiff may maintain this action or may recover anything herein against this defendant, entirely without fault, this defendant would thereby be deprived of its property without due process of law, and would thereby be denied the equal protection of the laws of the State of Arizona, all of which is contrary to the Constitution of the State of Arizona, and to the Fourteenth Amendment of the Constitution of the United States of America."

X.

Because the court erred in permitting defendant in error to amend its amended complaint during the course of the trial in the particular of alleging in and by such last mentioned amendment, direct and resulting injuries to the defendant in error's stomach, not having been set forth or claimed in defendant in error's original complaint or in defendant in error's amended complaint.

XI.

Because the court erred in permitting the defendant
305 in error, over the objection of the plaintiff in error, to testify as to the amount of wages earned and received by him at other times and places prior to his injury.

XII.

Because the court erred in permitting defendant in error to testify over the objection of this plaintiff in error as to what was the prevailing wage at the time of the trial in Greenlee County for the class of work that defendant in error was performing at the time he was injured.

XIII.

Because the court erred in sustaining defendant in error's objection to and excluding the testimony of witness Estanislado Provincio, offered by the plaintiff in error as to his habit and custom of stopping the calcine car operated by witness, if he did so stop it any distance from the hopper in which Mr. Hammer, the defendant in error, was engaged in work.

Because the court further erred in sustaining defendant in error's objection to and excluding the testimony of last said witness offered

by the plaintiff in error as to what he did in reference to stopping his car when he approached a hopper in which Mr. Hammer was engaged at work.

XIV.

Because the court erred in overruling plaintiff in error's objections to and admitting the testimony of witness Estanislado Provencio on cross examination by defendant in error viz: that if the door on the calcine car was properly closed the car would have passed over where Hammer, the defendant in error, was at work without injuring him any—wouldn't have burned him because no calcine would have poured down.

XV.

Because the court erred in sustaining defendant in error's objection to and excluding that certain blue-print map offered in evidence by plaintiff in error and subsequently filed and marked for identification.

306

XVI.

Because the Court erred in overruling plaintiff in error's objections to and permitting the testimony of witness, Elmer Bentley, offered by defendant in error in rebuttal; viz: a conversation between witness and one Mauro Provincio, wherein the said Mauro Provincio told witness that the reason that the calcine car did not stop, was that the brakes on the calcine car would not work, or words to that effect.

XVII.

The Court erred in denying plaintiff in error's motion for a directed verdict in behalf of the plaintiff in error.

XVIII.

Because the court erred in refusing to give to the jury the following instruction requested by plaintiff in error, and refused by the court:

"If you believe from the evidence that there is a comparatively safe method of placing these angle irons on the hopper and also a more dangerous one of placing the angle irons on this hopper by getting down into the hopper, and that these two methods were known to plaintiff at the time he undertook to place angle irons on top of the hopper in which he was injured, and if you believe from the evidence that he voluntarily selected the more dangerous method and the selection of the dangerous method in any degree contributed to the accident and injury, then I instruct you that he is guilty of contributory negligence, as hereinbefore defined, and cannot recover in this action, and your verdict should be for the defendant."

XIX.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"If the jury believe from the evidence that plaintiff was instructed by defendant that the proper and safe method to place the angle irons on the top of the hopper or hoppers was to place same from the top of the feed floor, and that plaintiff failed and refused to pursue the method directed by defendant and voluntarily adopted the method of placing said angle irons by getting down into the hopper, and the method selected by him in any way caused or contributed to the accident and injury as alleged in his complaint, then I charge you plaintiff cannot recover."

307

XX.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"The law imposes upon every person the duty of using ordinary care for his own personal protection against injury; this is what the courts mean when they say contributory negligence will defeat a recovery."

XXI.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error and refused by the court:

"I charge you that what the law means by "Contributory Negligence" is a want of ordinary care on the part of the person injured, which contributed in any degree to the injury, and without which the injury would not have happened, and that such act or omission was not such a one as would have been done or omitted by a person of ordinary prudence under the same or like circumstances, then I instruct you that the plaintiff cannot recover and your verdict should be for the defendant."

XXII.

Because the court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, and refused by the court:

"You are further instructed that the law under which this action is brought bases the liability of the defendant for damages solely upon the fact that the accident and resulting injury were due to a condition or conditions of a hazardous occupation of an employee in the service of such employer in such hazardous occupation. If you are satisfied from the evidence in the cause that the accident and resulting injury were due to a condition or conditions of such

occupation, while plaintiff was in the service of defendant in such hazardous occupation, yet plaintiff would not be entitled to recover in this action in such a situation unless the evidence in the cause further satisfies you that said accident and injury were not due in any degree to the negligence of the plaintiff."

XXIII.

Because there was misconduct in the proceedings of the prevailing party in this:

L. Kearney, Esq., attorney for defendant in error herein, in his closing argument before the jury and while discussing the evidence in the cause said: "Even if Hammer had remained in the
308 hopper and refused to get out as claimed by the defendant, nevertheless Hammer would not have been injured if the car had been in proper condition, and if it had not been for the negligence of the defendant in running the car over the hopper and spilling the calcine on him," or words to that purport and effect. To which remarks of counsel, plaintiff in error then and there objected.

That the court erred in refusing to withdraw said remarks from the jury, or in refusing to admonish the jury to disregard said remarks. To which action of the court, plaintiff in error then and there excepted, which exception was allowed by the court.

XXIV.

Because the evidence at the trial was insufficient to justify the verdict of the jury in this; viz:

(*a*) Because the evidence in the case shows that if the defendant in error received any injury at all on the day or date alleged in his complaint, that such injury was the result directly and proximately of his own negligence.

(*b*) Because the evidence in the cause shows by a preponderance thereof, that the negligence of the defendant in error contributed directly and proximately to the injury alleged in said complaint.

(*c*) Because the evidence introduced by the plaintiff in error in this action in respect to the alleged injury of defendant in error showed without exception that the injury to defendant in error was caused by the negligence of defendant in error, in this: that defendant in error was duly and timely informed and warned of the approach of the calcine car from which spilled the hot calcine, producing said injury and that defendant in error knew and appreciated such warning, but negligently refused to heed the same and get out of the hopper in which he was working, and assume a place of safety; and that all the evidence introduced by the defend-
309 ant in error in this action shows, if such evidence be taken to be true, that defendant in error in the course of work in his employment or occupation, arising out of and in the course of defendant in error's labor, service and employment and due to a condition or conditions of defendant in error's said occupation or

employment, as alleged and set forth in defendant in error's complaint and as expressly avowed by defendant in error in open Court, but was due to the negligence of this plaintiff in error, its officers, servants, employees or other agents, in this: viz: that if the evidence introduced by the defendant in error be taken to be true, the injury to the defendant in error was due solely,

1st. To a defective and improperly repaired calcine car, from which the calcine spilled upon defendant in error:

2nd. To the negligent failure of the employee of this plaintiff in error in charge of said car to stop the same upon approaching the hopper in which defendant in error was at work and give the defendant in error an opportunity to get out of said hopper and assume a place of safety.

XXV.

Because the damages assessed by the jury are excessive.

XXVI.

Because the verdict of the jury is against the law.

XXVII.

Because under the law and the evidence in the cause, the verdict and judgment should be for the plaintiff in error.

XXVIII.

That the United States District Court, in and for the District of Arizona, erred in overruling and denying the petition for a new trial filed therein by plaintiff in error, for the reason that in and by said petition for a new trial, said plaintiff in error set forth certain newly discovered evidence, and supported the same with
310 sworn affidavits, as required by law and the rules of the court; which said newly discovered evidence, was, in point of fact, new evidence, and not cumulative, and as plaintiff in error believes, would, upon a retrial of this cause, result in changing the verdict of the jury in favor of plaintiff in error.

Wherefore plaintiff in error prays that the judgment of said court be reversed.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for the Arizona Copper Company, Limited, Plaintiff in Error.

Received copy within petition for writ of error and assignments of error this 4th day of March, 1916.

FRANK E. CURLEY,
Attorney for Defendant in Error.

Endorsements: No. 39 Tucson. In the District Court of the United States for the District of Arizona. The Arizona Copper Company, Limited, a corporation, plaintiff in error, vs. Joseph B. Hammer, defendant in error. Petition for Writ of Error. Assignment of Errors. Filed March 4, A. D., 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error.

311 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Bond of Writ of Error from Supreme Court of the United States.

Know all Men by these Presents The The Arizona Copper Company, Limited, a corporation, Plaintiff in Error above-named, as principal, and American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to do business as a surety company in the State of Arizona, as surety, are held and firmly bound unto Joseph B. Hammer, Defendant in Error, above-named, in the full and just sum of Fifteen Thousand ($15,000) Dollars, to be paid to the said Defendant in Error, to which payment well and truely to be made, the said principal binds itself, its successors and assigns jointly and severally, firmly by these presents.

Witness: the names and seals of the said principal and surety, this 3rd day of March, 1916.

The condition of the above obligation is such that whereas, at a session of the United States District Court, in and for the District of Arizona, in a suit pending in said court between The Arizona Copper Company, Limited, a corporation, Plaintiff in Error,
312 and Joseph B. Hammer, Defendant in Error, said United States District Court, in and for the District of Arizona, rendered a final judgment upon a verdict of the jury, duly empaneled in said cause; said judgment by said District Court being in favor of said Joseph B. Hammer and against said The Arizona Copper Company, Limited, and being for the sum of Twelve Thousand ($12,000) Dollars with costs; and

Whereas, the said Plaintiff in Error obtained a writ or error to reverse the judgment of said United States District Court, in and for the District of Arizona, and filed a copy thereof in the Clerk's Office in said Court, and a citation directed to said Joseph B. Hammer, Defendant in Error, citing and admonishing the said Defendant in Error to be and appear before the Supreme Court of the United States.

Now, if the said, The Arizona Copper Company, Limited, shall

prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

THE ARIZONA COPPER COMPANY, LIMITED,
By W. C. McFARLAND,
Its General Attorney, Principal.
AMERICAN SURETY COMPANY OF NEW YORK,
A Corporation Organized and Existing under and by Virtue of the Laws of the State of New York and Authorized to do Business as a Surety Company in the State of Arizona,
By H. E. HEIGHTON,
Attorney in Fact, Surety.

Countersigned by
[Seal of Surety.] RALPH W. LANGWORTHY.

313 Approved this 4th day of March, A. D., 1916.
WM. H. SAWTELLE,
Judge of the United States District Court in and for the District of Arizona.

Endorsements: No. 39 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Bond of Writ of Error from Supreme Court of United States. Copy received M'ch 4, 1916. Frank E. Curley, Att'y for Def't in Error. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D., 1916, Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

314 In the United States District Court in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Præcipe.

To the Clerk of Said Court:

Sir: Please issue a single certified transcript of the record on return to Writ of Error taken by plaintiff in error from the Supreme Court of the United States in the above entitled cause, consisting of the following:

1. Amended Complaint.
2. Summons and Return.
3. First Amended Answer.
4. Transcript of Minute Entries.

5. Verdict of Jury.
6. Judgment.
7. Bills of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Error.
10. Bond and approval thereof given on Writ of Error.
11. Order allowing Writ of Error.
12. Writ of Error.
13. Citation in Error.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Plaintiff in Error.

315 Endorsements: No. 39 Tucson. In the United States District Court in and for the District of Arizona. The Arizona Copper Company, Limited, a corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Praecipe. Filed this 4th day of March, 1916. Mose Drachman, Clerk, by Ellie D. Botts, Deputy Clerk. Service of within Praecipe by true copy admitted this 4th day of March, 1916. Frank E. Curley, Attorney for Defendant in Error. W. C. McFarland, H. A. Elliott, Attorneys for Plaintiff in Error, Clifton, Arizona.

316 *Certificate of Clerk U. S. District Court to Transcript of Record.*

In the United States District Court for the District of Arizona.

No. 39, Tucson.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

UNITED STATES OF AMERICA,
District of Arizona, ss:

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, number 1 to 315, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, and proceedings had in the case of Joseph B. Hammer, Plaintiff, vs. The Arizona Copper Company, Limited, a corporation, defendant, No. 39 (Tucson) in this Court, as the same remain on file and of record in said District Court, and I also annex and transmit the original Writ of Error, and Citation, in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $353.50 and that the same has been paid in full by the plaintiff in error, The Arizona Copper Company, Limited, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona at Tucson, in said District, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and six-
317 teen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
Clerk United States District Court,
District of Arizona,
By EFFIE D. BOTTS,
Deputy Clerk.

318 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,
Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States District Court in and for the District of Arizona, and the Honorable Judge thereof, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea, which is in said United States District Court, in and for the District of Arizona, between the Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, and Joseph B. Hammer, Defendant in Error, *and* manifest error hath appeared to the great damage of said Plaintiff in Error, as by its complaint appears; and it being fit, and we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to this, the Supreme Court of the United States, together with this writ, so you have the same in the said Supreme Court at Washington, D. C., within sixty days from the date hereof, that the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done herein to correct that error, what of right and according to the law and customs of the United States, should be done.

319 Witness: The Honorable Edward Douglass White, Chief Justice of the United States Supreme Court, this 4th day of

March, in the year of our Lord, One Thousand, Nine Hundred and Sixteen.

[Seal United States District Court, District of Arizona.]

MOSE DRACHMAN,
Clerk of the United States District Court
in and for the District of Arizona.
By EFFIE D. BOTTS,
Deputy Clerk.

Allowed by
WM H. SAWTELLE,
Judge of the United States District Court
in and for the District of Arizona.

Service of within writ of error by receipt of true copy admitted, this, the 4 day of March, 1916.

FRANK E. CURLEY,
Attorney for Defendant in Error.

[Endorsed:] No. 39, Tucson. In the District Court of the United States in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Order. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

320 In the District Court of the United States in and for the District of Arizona.

THE ARIZONA COPPER COMPANY, LIMITED, a Corporation,
Plaintiff in Error,
vs.
JOSEPH B. HAMMER, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Joseph B. Hammer, and to L. Kearney and Frank E. Curley, your attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., on the 1st day of May, 1916, pursuant to a writ of error filed in the Clerk's Office of the United States District Court, in and for the District of Arizona, wherein The Arizona Copper Company, Limited, is Plaintiff in Error and you, Joseph B. Hammer, are Defendant in Error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable William H. Sawtelle, Judge of the United States District Court, in and for the District of Arizona, this 4th day of March, A. D., 1916.

WM. H. SAWTELLE,
Judge of the United States District Court
in and for the District of Arizona.

321 Service of the within citation by receipt of a true copy admitted this 4 day of March, 1916.

FRANK E. CURLEY,
Attorney for Defendant in Error.

[Endorsed]: No. 39 Tucson. In the District Court of the United States, in and for the District of Arizona. The Arizona Copper Company, Limited, a Corporation, Plaintiff in Error, vs. Joseph B. Hammer, Defendant in Error. Citation. W. C. McFarland and H. A. Elliott, Attorneys for Plaintiff in Error. Filed March 4, A. D. 1916. Mose Drachman, Clerk, by Effie D. Botts, Deputy Clerk.

Endorsed on cover: File No. 25,285. Arizona. D. C. U. S. Term No. 1002. The Arizona Copper Company, Limited, plaintiff in error, vs. Joseph B. Hammer. Filed May 9th, 1916. File No. 25,285.